FILED

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No.

IN THE

Supreme Court of the United States

In re: ESTATE OF BOBBY N. GRAVEN, and
In re: BOBBY F. GRAVEN, Personal Representative of
the Estate of MILLIE ANN GRAVEN, deceased,

Debtors.

JIANBIN "JIM" WEI,

Petitioner,

v.

RICHARD V. FINK, Trustee, and
THOMAS J. O'NEAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. A federal district court sits as an appellate court in a consolidated bankruptcy appeal consisting of two separate appeals. Before consolidation, the appellee filed a motion for sanctions in *only* one of the two appeals. The questions are: Whether the district court may, after denying *the* motion for sanctions, enter Rule 11 monetary sanctions in *both* appeals without first issuing an order to show cause? Whether the imposition of monetary sanctions in such manner violated the Fifth Amendment right to due process of the person sanctioned? And whether the district court may order the sanctions so entered to be paid to the appellee?

2. Whether a federal district court may enter Rule 11 sanctions with an order which does not describe the conduct determined to constitute a violation of Rule 11? And whether the imposition of monetary sanctions in such manner violated the Fifth Amendment right to due process of the person sanctioned?

3. Whether it is an abuse of discretion and a violation of Fed. R. Bankr. P. 9011 for a bankruptcy court to sanction counsel for making a legal contention which is supported by specific case law?

4. Whether it is an abuse of discretion and a violation of Fed. R. Bankr. P. 9011 for a bankruptcy court to sanction counsel for pointing out the court's contradiction on a factual issue bearing on the vital right of counsel's client and for seeking relief for counsel's client based on said contradiction?

PARTIES TO THE PROCEEDING IN THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Jianbin "Jim" Wei, Petitioner herein, is a citizen of the State of Missouri. He is an attorney licensed to practice in the State of Missouri. Petitioner represented the debtors in seeking relief from the underlying involuntary chapter 7 proceeding. He was one of the appellants to the appeal in the Eighth Circuit.

Bobby Noah Graven, a family farmer, is a citizen of the State of Missouri. He is one of the debtors in the underlying involuntary chapter 7 proceeding, and was one of the appellants to the appeal in the Eighth Circuit.

Bobby F. Graven, is a citizen of the State of Missouri. He is the personal representative of the Estate of Millie Ann Graven, deceased family farmer debtor in the underlying involuntary chapter 7 proceeding, and was one of the appellants to the appeal in the Eighth Circuit.

Respondent, *Richard V. Fink*, is a citizen of the State of Missouri. He is the appointed chapter 7 trustee for the bankruptcy estate of the debtors in the underlying involuntary chapter 7 proceeding. Mr. Fink was the Appellee to the appeal in the Eighth Circuit.

Respondent, *Thomas J. O'Neal*, is a citizen of the State of Missouri. Mr. O'Neal and the law firms with which he is and was affiliated served and still serve as the attorney for the bankruptcy trustee, Richard V. Fink. His former law firm, Bussell, O'Neal & Hall, was an appellee to the bankruptcy appeal in the U.S. District Court prior to the appeal in the Eighth Circuit. Bussell, O'Neal & Hall was dissolved after the district court's orders in this case. The

Eighth Circuit characterized Mr. O'Neal as an "interested party" to the appeal in the Eighth Circuit.

Bob W. Crouch is a citizen of the State of Missouri. Mr. Crouch and Respondent Thomas J. O'Neal were members of the law firm of Bussell, Hough, O'Neal, Crouch & Hall which served as the attorney for the bankruptcy trustee from June of 1989 to its dissolution in September of 1990. Mr. Crouch was an appellee and respondent in the appeal in the Eighth Circuit.

Farmers Mutual Insurance Company of Dade County is a Missouri mutual insurance company. It was a client of the law firm of Bussell, Hough, O'Neal, Crouch & Hall. Farmers Mutual was a respondent in the appeal in the Eighth Circuit.

There are no other parties and no corporations to this proceeding.

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Petitioner, Jianbin "Jim" Wei, attorney for the debtors in the underlying bankruptcy case, respectfully petitions for this Court's review of the judgment of U.S. Court of Appeals for the Eighth Circuit which affirmed the sanctions (totaling $15,593.78) entered against Petitioner by U.S. Bankruptcy Court and U.S. District Court for the Western District of Missouri.

OPINIONS BELOW

The July 27, 1999 decision (App. A, 1a) of the Eighth Circuit sought to be reviewed here was entered without an opinion pursuant to 8th Cir. R. 47B and, therefore, is not published. The three orders of the district court affirmed by the Eighth Circuit decision are App. B(5a-11a), C(12a), and D(13a-14a), none of which is published. The bankruptcy court's opinions affirmed by the district court are App. E(15a-28a), not published, and App. F(29a-43a), published as *In re Graven*, 196 B.R. 506 (Bankr. W.D. Mo. 1996). The Eighth Circuit's order denying Petitioner's petition for rehearing is App. G(44a).

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

By judgment and decision, both dated July 27, 1999, the Eighth Circuit summarily affirmed the monetary sanctions which the district court and the bankruptcy court entered against Petitioner. Petitioner's timely-filed petition for rehearing was denied on August 31, 1999. Petition for writ of certiorari was originally due on November 28, 1999. By order dated November 15, 1999, this Court granted Petitioner an extension until January 28, 2000. A petition was filed on January 28, 2000 but the same was returned for correction. This corrected petition is pursuant to Supreme Court Rule 14.5.

The basis of jurisdiction of this Court is 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Relevant portions of the Fifth Amendment to the United States Constitution, Fed. R. Civ. P. 11 and 60(b), and Fed. R. Bankr. P. 9011(a) are set forth in App. H (45a-47a).

STATEMENT OF THE CASE

The jurisdiction of the court of first instance, U.S. Bankruptcy Court for the Western District of Missouri (hereinafter the "bankruptcy court"), was based on 28 U.S.C. §157. The proceedings giving rise to the July 27, 1999 decision and judgment of the Eighth Circuit sought to be reviewed here are as follows:

The Original Bankruptcy Proceedings

In November of 1987, Bobby N. Graven and his late wife, Millie Ann Graven (hereinafter "Debtors"), both family farmers, filed a petition for relief under chapter 12 of the Bankruptcy Code. In 1988, on allegations of fraudulent conveyance, the bankruptcy court ordered the chapter 12 trustee, Mr. Richard V. Fink (Respondent herein), to investigate Debtors' pre-petition transfers, out of a concern that the same might have been in fraud of creditors under the Missouri Fraudulent Conveyance Act. §408.020 RSMo. (1986). *In re Graven*, 84 B.R. 630 (Bankr. W.D. Mo. 1988) (App. O, 71a-75a). In his May 3, 1988 application to employ Thomas J. O'Neal, Respondent herein, to conduct the investigation, Mr. Fink stated that "three general creditors

have agreed to *guarantee* the payment of Mr. O'Neal's fees *in the event there are not any funds in the estate to pay them.*" (Italics added) (App. S, 93a). On the same date and without notice and hearing, the bankruptcy court approved the employment of Mr. O'Neal and authorized the guaranty arrangement, although section 364(b) of the Bankruptcy Code required notice and hearing before the bankruptcy estate may borrow funds for purposes other than those necessary for the operation of the debtor's business. Mr. O'Neal's investigation concluded that all of Debtors' pre-petition transfers were "made with the intent to hinder, delay or defraud" the creditors of Debtors and recommended that proceedings be brought to set aside the pre-petition transfers.

Feeling that the investigation was biased and that the allegations were false, Debtors applied for voluntary dismissal pursuant to 11 U.S.C. §1208(b) which provided:

> On request of debtor at any time, if the case has not been converted under sections 706 or 1112 of this title, the court shall dismiss a case under this chapter.

In response, the trustee moved for conversion to chapter 7 pursuant to 11 U.S.C. §1208(d) which provided:

> On request of a party in interest, and after notice and hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

After a brief motion hearing which lasted less than an hour and at which no witness was called, the bankruptcy court converted the case to chapter 7 liquidation over Debtors'

objection in May of 1989, finding that by the pre-petition transfers and other related conducts, Debtors had engaged in a "clear pattern of deliberate fraud perpetrated with the intent to hinder, delay and defraud the creditors of the debtors." *In re Graven*, 101 B.R. 109, 111 (Bankr. W.D. Mo. 1989) (App. P, 76a). On Debtors' appeal from the involuntary conversion, the Eighth Circuit affirmed. *In re Graven*, 936 F.2d 378 (8th Cir. 1991).

After the involuntary conversion, the trustee brought an adversary proceeding in 1989 to have Debtors' pre-petition transfers set aside as fraudulent conveyances and to deny Debtors a discharge under 11 U.S.C. §727(a). In 1992 and after the Eighth Circuit affirmed the involuntary conversion, the trustee moved for summary judgment in the adversary proceeding, relying on *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989). The bankruptcy court denied the trustee's motion, stating that whether Debtors had transferred assets with the intent to hinder, delay and defraud their creditors was still a disputed factual issue requiring a trial. *In re Graven*, 138 B.R. 587 (Bankr. W.D. Mo. 1992)(App. Q, 85a). As another reason for denying the trustee's motion for summary judgment, the bankruptcy court stated that Debtors had not had a "fair and full opportunity" to litigate the issue of intent back in 1989. (88a).

In November of 1992, without a trial and by way of sanctions the bankruptcy court entered judgment against Debtor Bobby N. Graven, declaring the pre-petition transfers as fraudulent conveyances and denying him a discharge. In February of 1993 and after a trial on the issue of damages *only*, the bankruptcy court ordered Debtors to pay "actual" damages of $122,086.45 and punitive damages of $50,000 for making fraudulent conveyances. (32a).

In the original bankruptcy proceedings, Debtors were represented by other counsel, not by Petitioner.

Independent Action for Relief from Involuntary Chapter 7 Proceedings

In March of 1996, pursuant to Fed. R. Civ. P. 60(b) (App. H, 47a), Petitioner filed on behalf of Debtors a two-count independent action to seek Debtors' relief from the involuntary chapter 7 proceeding and the previous orders and judgments. (App I, 48a-56a). The first count asked for the dismissal of the involuntary chapter 7 case on the ground that 11 U.S.C. §303(a) prohibited an involuntary chapter 7 case against a family farmer. The second count sought dismissal on the ground that because the bankruptcy court held in *1992* that whether Debtors had transferred their assets with the intent to hinder, delay and defraud their creditors was a disputed factual issue, the court could not have found such intent back in *1989* when it forced Debtors into chapter 7 proceeding. Therefore, even if 11 U.S.C. §1208(d) allowed an involuntary conversion of a chapter 12 case to a case under chapter 7, the statutorily-required finding of fraud was not and could not have been made in 1989.

The bankruptcy court dismissed both counts of Debtors' independent action and imposed Fed. R. Bankr. P. 9011 sanctions of over $5,358.78 against Petitioner and Debtors jointly and severally. (App. F, 29a-43a). Petitioner appealed on his own behalf with respect to the sanctions and on behalf of Debtors with respect to the other issues. That appeal constituted district court case No. 96-3388.- On November 20, 1996, the trustee filed in case No. 96-3388 a Motion for Sanctions against Petitioner and Debtors.

Motion for Removal of, and for Denial of Compensation to the Trustee and His Attorney and for Dismissal

While appeal No. 96-3388 was being perfected, Debtors learned from the billing records of the trustee's attorney, which was obtained after the filing of Motion to Compel, that beginning from January of 1989, three creditors of Debtors had been paying the trustee's attorney, Mr. O'Neal and his law firms, to conduct investigation and proceedings against Debtors, when the bankruptcy court only allowed that the fees of the trustee's attorney be "*guaranteed by the creditors in the event that the estate does not have enough funds to pay them.*" (App. S and T, 93a-94a). The secret payment started on January 17, 1989,[1] and continued thereafter during the adversary proceeding whereby the trustee's attorney first sought and obtained a denial of discharge to Debtor Bobby N. Graven *and* then a money judgment against him for "actual" damages of $122,086.45 and punitive damages of $50,000, all for making alleged fraudulent conveyances. The billing records of the trustee's attorney showed that by September 16, 1992, the three creditors had paid the trustee's attorney $61,612.03. On October 31, 1994, the bankruptcy court allowed the three creditors super priority administrative claim status for *all* the monies (totaling $69,133.56) they had paid the trustee's attorney before that date. By letter dated August 14, 1996, the trustee's attorney admitted that the three creditors had paid it $18,333.69 since October of 1994, (App. R, 91a-92a), bringing the total amount paid as of August 14, 1996, to $87,267.25. Prior to receiving the monies from the creditors,

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[1]The billing records of the trustee's attorney reflect that the trustee's attorney sent its first bill to the three creditors "for current services rendered" on December 29, 1988, when the trustee's attorney was actively conducting investigation of Debtors. That bill in the total amount of $6,071.24 was paid on January 17, 19, and March 2, 1989.

the trustee's attorney never filed a fee application with the bankruptcy court pursuant to 11 U.S.C. §331 and never gave notice to the bankruptcy court or Debtors.

Debtors also learned from the billing records of the trustee's attorney that during the course of the past proceedings, the trustee's attorney, Mr. O'Neal, had several *ex parte* communications with the presiding judge concerning the case against them in violation of Fed. R. Bankr. P. X-1010(abrogated). Some of the *ex parte* communications occurred at a time when the trustee's attorney was conducting investigation of Debtors. For instance, the billing record of the trustee's attorney states that on August 16, 1988, Mr. O'Neal had a "[t]elephone conference [of fifteen minutes] with Judge Koger's office concerning the status of anticipated [investigation] report-*updated on developments*." (Italic added). All of the *ex parte* communications were billed to and were paid for by the three creditors.

It was also confirmed that in 1989 and 1990, while serving as the trustee's attorney, Mr. O'Neal's former law firm, Bussell, Hough, O'Neal, Crouch & Hall (BHOC&H),[2] committed a conflict of interest by representing Farmers Mutual Insurance Company of Dade County (hereinafter "Farmers Mutual") in a loss claim which resulted from a fire at 503 Carlton, Mountain Grove, Missouri, a piece of real property which, according to the trustee, belonged to the bankruptcy estate. The cost of repairing the fire damage was $7,300, but with the help of BHOC&H, Farmers Mutual paid only $2,500. (App. J, 57a).

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[2]The law firm of BHOC&H was appointed as the attorney for the Chapter 7 trustee in June of 1989 after the involuntary conversion and its fees were again authorized to be guaranteed by the three creditors. (20a).

Based upon the secret direct payment arrangement, the actual conflict of interest and *ex parte* communications, Petitioner moved on behalf of Debtors to rescind the order authorizing the fee guarantee arrangement, to remove the trustee and his attorney and to deny their compensation. Debtors also sought dismissal of the involuntary bankruptcy case on the ground that the past proceedings against Debtors had been tainted by the secret direct payment arrangement and by the *ex parte* communications.

A hearing on Debtors' motions was held on October 21, 1996. At the hearing Mr. O'Neal admitted that his law firm had received a fee for the services it had rendered to Farmers Mutual in the fire loss matter. (App. K, 58a). Notwithstanding the uncontroverted evidence of actual conflict of interest and misconduct (taking monies from the creditors without the authorization of the bankruptcy court and without complying 11 U.S.C. §331) by the trustee's attorney, the bankruptcy court denied all of Debtors' motions. (App. E). Petitioner appealed the bankruptcy court's rulings on behalf of Debtors to the district court in January of 1997. That appeal constituted district court case No. 97-3044.

On Debtors' motion and over the objections of the trustee and his attorney, the district court consolidated cases No. 96-3388 and No. 97-3044. The trustee filed no motion for sanctions after the consolidation. The only motion for sanctions pending for decision by the district court after the consolidation was the one filed by the trustee in case No. 96-3388.

After the consolidation, the district court issued three *separate* orders: (1) By order of 11/07/1997, the district court affirmed the bankruptcy court in case No. 96-3388, *overruled* the trustee's Motion for Sanctions in that case, but then entered, *on its own initiative and without first issuing a show*

cause order, Rule 11 sanctions against Petitioner and Debtor. (App. B). (2) On 11/17/1997, the court issued a one-paragraph order affirming the bankruptcy court in case No. 97-3044. (App. C). (3) By order of 01/27/1998, (App. D), the court awarded the trustee $10,235 which represented all of the attorney's fees and expenses the trustee claimed to have incurred in defending both case No. 96-3388 and case No. 97-3044. See Affidavit of Expenses and Fees of Mr. O'Neal. (App L, 59a-61a).

Petitioner appealed the district court's order of sanctions to the Eighth Circuit. On July 27, 1999, the Eighth Circuit summarily affirmed without an opinion. On August 31, 1999, the court denied Petitioner's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should issue because the district court violated Fed. R. Civ. P. 11(c)(2)(B) and Petitioner's right to due process by entering Rule 11 monetary sanctions on its own initiative without first issuing a show cause order, and because the Eighth Circuit *chose* not to enforce Rule 11 in this case.

Fed. R. Civ. P. 11(c) provides that if, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, *"subject to the conditions"* set forth in subdivision (c), impose an appropriate sanction on a party and/or his or her attorney. Rule 11(c)(2)(B) provides that "[m]onetary sanctions may not be awarded on the court's own initiative unless the court issues its order to show cause." The Advisory Committee Notes on the 1993 amendment to Rule 11 also states that the power of the court to act on its own initiative is retained but

with the condition that it be done through a show cause order. The requirement of a show cause order reflects the basic principle this Court enunciated in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), that monetary sanctions "should not be assessed lightly or without fair notice and opportunity for hearing on the record."

Advisory Committee Note on the 1983 Amendment to Rule 11 states that the procedure followed in imposing sanctions "must comport with due process requirement." Several circuits of the court of appeals have held that entering sanctions without proper notice and opportunity to respond violates the right to due process of the person sanctioned. *Rounsville v. Zahl*, 13 F.3d 625, 632 (2nd Cir. 1994); *Simmerman v. Corino*, 27 F.3d 58, 64 (3rd Cir. 1994); *Veillon v. Exploration Services, Inc.*, 876 F.2d 1197, 1201(5th Cir. 1989); and *Tom Growney Equip. v. Shelley Irr. Develop.*, 834 F.2d 833, 835-36 (9th Cir. 1987). In addition to being a due process requirement, notice and opportunity to respond also serves several practical purposes. It ensures that (1) the person sought to be sanctioned will have an opportunity to defend and explain the questioned conduct; (2) the judge will have adequate time to consider the questioned conduct in light of the explanation offered; and (3) it provides a record for appellate review. *Simmerman v. Corino*, 27 F.3d at 64; and *Tom Growney Equip. v. Shelley Irr. Develop.*, 834 F.2d at 836.

Now, under the clear language of Rule 11 and the cases cited above, did the district court violate Rule 11 and Petitioner's right to due process under the Fifth Amendment by entering monetary sanctions against Petitioner? The record speaks clearly that it did.

After the consolidation of case No. 96-3388 and case 97-3044, the only motion for sanctions pending for decision

by the district court was the one filed by the trustee in case No. 96-3388. By order dated 11/07/1997, (App. F), the district court affirmed the bankruptcy court's order in case No. 96-3388. The same order also *denied* the trustee's motion for sanctions filed in that appeal. The court made this very clear by stating it three times: first in the title of its order, *"Order . . . Overruling Appellee's Motion to Dismiss and for Sanctions"*, (5a); then in the beginning of the order, "the Trustee's Motions to Dismiss and For Sanctions are OVERRULED", (6a); and again at the end of its order, "the Trustee's Motion to Dismiss and For Sanctions is denied." (11a). After denying the trustee's motion for sanctions, the district court decided on its own initiative to impose Rule 11 sanctions, but before doing so it did not issue a show cause order. On January 27, 1999, the district court set the amount of sanctions at $10,235, which the trustee claimed to have incurred in defending both case No. 96-3388 and case No. 97-3044. (59a-61a).

Why the district court decided to overrule the trustee's motion for sanctions and then to enter sanctions on its own initiative in case No. 96-3388 was never explained. Nor was an explanation offered as to why, after the consolidation, the district court chose to issue *separate* orders on the consolidated cases. But one thing is clear from the record: The sanctions in case No. 96-3388 were imposed on the court's own initiative after the court denied the trustee's motion for sanctions, and the sanctions entered in case No. 97-3344 were preceded neither by a motion for sanctions nor by a show cause order.

By entering Rule 11 monetary sanctions on its own initiative without first issuing a show cause order, the district court clearly violated Rule 11(c)(2)(B) and deprived Petitioner of property interest without due process of law in violation of the Fifth Amendment. This was a clear legal

error which, once called to the attention of the Eighth Circuit,[3] should have been corrected, but it was not. The Eighth Circuit *chose* not to enforce Rule 11 in this particular case, even though it said that it had "doubts" about the fairness of the sanctions against Petitioner.[4]

II.

Certiorari should issue because the district court violated Fed. R. Civ. P. 11(c)(2) by ordering monetary sanctions against Petitioner on its own initiative but ordering the same to be paid to the opposing party, and because the Eighth Circuit *chose* not to enforce Rule 11 in this case.

Rule 11(c)(2) states the nature and limitations of Rule 11 sanctions:

> the sanctions may consist of, or include, directives of nonmonetary nature, an order to pay a penalty into court, or, *if imposed on motion* and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation. (Italics added.)

The Advisory Committee Notes on the 1993 amendment to Rule 11 also states that "a monetary sanction imposed after a

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[3] Petitioner pointed out this error both in the appellate brief and in the petition for rehearing. (App. M and App. N).

[4] The Eighth Circuit stated that it had "some doubts" about the fairness of the sanctions against Petitioner. (4a). It also stated that it could not say that the district court and the bankruptcy court abused their discretion in imposing the sanctions. (4a). Petitioner is puzzled by such statements because, "How could sanctions that were unfair be upheld as not an abuse of discretion?"

court-initiated show cause order be limited to a penalty payable to the court."

In the instant case, the district court not only imposed monetary sanctions on its own initiative without a show cause order in violation of Rule 11(c)(2)(B), it also awarded the sanctions so imposed to the opposing party in violation of Rule 11(c)(2). Again, this was a clear legal error which, once called to the attention of the Eighth Circuit, should have been corrected. But again it was not. The Eighth Circuit *chose* not to enforce Rule 11 in this particular case.

III.

Certiorari should issue because the district court violated Fed. R. Civ. P. 11(c)(3) and Petitioner's right to due process by entering an order of sanctions which did not "describe the conduct determined to constitute a violation of the rule" and because the Eighth Circuit *chose* not to enforce Rule 11 in this case.

Rule 11(c)(3) provides that when imposing sanctions, the court *"shall"* describe the conduct determined to constitute a violation of subdivision (b). This requirement was apparently designed to prevent abuse and to facilitate appellate review of the propriety of the sanctions imposed. *Confederate Memorial Ass'n, Inc. v. Hines*, 995 F.2d 295, 301 (D.C. Cir. 1993) (stating that effective appellate review is impossible unless the district court explains its reasons for imposing sanctions and, therefore, findings of facts are essential to appellate review); and *Pacific Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 118 (7th Cir. 1994) (stating that the appellate court looks to the district court's *articulated* reasons for imposing sanctions).

The Eighth Circuit stated that the district court has "adequately justified" the sanctions, (4a), but all that the

district court said in imposing sanctions in case No. 96-3388[5] was as follows:

C. SANCTIONS

> This Court finds that an award of sanctions are appropriate in this case. Therefore, pursuant to Federal Rules of Civil Procedure 11, the Court imposes sanctions for the cost and reasonable attorneys fees in defending this appeal against Debtors and their attorney, jointly and severally. The Trustee shall provide to the Court an estimation and calculation of costs and fees to the Court for inspection within 30 days from the date of this order so that the Court can determine an appropriate award. (10a)

On case No. 97-3044, here is *all* that the district court said:

> Pending is an appeal of the Bankruptcy Court's decision denying relief from[sic] the Debtors' Motion to Remove Trustee and his Attorney; for denial of all compensation to the trustee's attorney, and for several other related motions (Doc #6 in case number 97-3044, now consolidated with case 96-3388). After a review of the record and the parties briefs in this matter, the Bankruptcy Court's decision is affirmed. (12a)

The order did not state that appeal No. 97-3044 was frivolous and warranted Rule 11 sanctions,[6] but in its order of January

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[5]The order of sanctions dated November 7, 1997 was entered in case No. 96-3388, not in case No. 97-3044, because the court did not decide case No. 97-3044 until November 17, 1997. (App. C, 12a).

[6]In affirming the bankruptcy court in case No. 97-3044, the district

27, 1998, the district court awarded the trustee attorney's fees and expenses incurred in defending case No. 97-3044. This was clearly an abuse of discretion. *LaSalle National Bank of Chicago v. DuPage County*, 10 F.3d 1333, 1338 (7th Cir. 1993) (holding that it is an abuse of discretion when a court enters Rule 11 sanctions without an explanation or with an explanation that is so conclusive that the appellate court can not review the substance of the decision).

Without an order describing the conduct determined to constitute a violation of Rule 11, Petitioner was puzzled as to why he and his clients were sanctioned for bringing to the courts' attention the actual conflict of interest and misconducts (taking monies from the creditors without the knowledge and prior authorization of the bankruptcy court and without complying with 11 U.S.C. §331) which the trustee's attorney had committed during the past proceedings of this case. Petitioner's bewilderment was compounded because the well-established laws and uncontroverted evidence required the removal of and denial of compensation to the trustee's attorney.[7] Since sanctions are damages

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court did not recite any of the facts underlying Debtors' motions and did not discuss any of the issues raised by the motions, i.e., whether the attorney for a bankruptcy trustee may, without the knowledge and prior authorization of the bankruptcy court, take monies from the creditors of a debtor to conduct proceedings against the debtor including proceedings to deny the debtor a discharge, and whether such an attorney should be removed and its compensation denied for actual conflict of interest committed while serving as the attorney for the bankruptcy estate, where such attorney has received a fee for the conflicting representation and where such conflict has harmed the bankruptcy estate.

[7] On compensation of an attorney employed by the bankruptcy estate, section 331 of the Bankruptcy Code requires an application, notice, hearing and court approval before monies can be disbursed to a professional person. The purpose of the statutes is to make sure that

awarded as a matter of justice to the appellee and as a penalty

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the services be actual and necessary and that the compensation therefor reasonable. *In re S.T.N. Enterprises, Inc.*, 70 B.R. 823, 831(Bankr. D. Vt. 1987). The direct-payment arrangement was designed to skip all these requirements and called for the removal of the trustee and his attorney. See *In re Vega*, 102 B.R. 552 (Bankr. N.D. Texas 1989) (removing the trustee because the trustee had disbursed funds borrowed for litigation purposes to attorneys without court approval).

O conflict of interest, it has been said that equity tolerates in a bankruptcy trustee no interest that is adverse to the bankruptcy estate, not because such interests are always corrupt but because they are always corrupting. *Mosser v. Darrow*, 341 U.S. 267, 271, 71 S. Ct. 680, 682 (1951). Courts have generally denied fees as a matter of course under sections 328(c) if there is a conflict. *Matter of Wiredyne, Inc.*, 3 F.3d 1125, 1127 (7th Cir. 1993); and *In re Georgetown of Kettering, Ltd.*, 750 F.2d 536 (6th Cir. 1984). Conflict of interest rules are more strictly applied in the bankruptcy context than in other areas of law at least insofar as professionals retained by the estate are concerned in order to maintain the integrity of the bankruptcy process. *In re Rusty Jones, Inc.*, 134 B.R. 321, 346 (Bankr. N. D. Ill. 1991). The rule of lenity in interpreting conflict of interest rules goes against the basic principle of bankruptcy law of undivided loyalty. *Id.* Awarding fees to an attorney who has committed a conflict of interest would undermine public confidence in the bankruptcy process. *In re Florida Peach Corporation of America, Int'l Division*, 110 B.R. 589, 593 (Bankr. M.D. Fla. 1990). See also *In re Diamond Mortgage*, 135 B.R. 78, 92 (Bankr.. N.D. Ill. 1990); and *In re Rusty Jones, Inc.*, 134 B.R. 321, 347 (Bankr. N.D. Ill. 1991) (holding that denial of compensation is required without exception if the conflict of interest is actual).

Section 327(a) prohibits the employment of a professional person who represents or holds an interest that is adverse to the bankruptcy estate or who is not a disinterested person within the meaning of 11 U.S.C. 101(14). By reason of his former firm's conflicting representation which resulted in harm to the bankruptcy estate, Mr. O'Neal is no longer a disinterested person and must therefore be removed.

against the appellant, *Ruderer v. Fines*, 614 F.2d 1128, 1132 (7th Cir. 1990), Petitioner was left in complete dark as to how, as a matter of justice, the trustee's attorney should be paid for defending its own actual conflict of interest and other misconducts.[8]

Again, the district court's imposition of Rule 11 sanctions without an order describing the conduct determined to constitute a violation of Rule 11(b) was a clear legal error which, once called to the attention of the Eighth Circuit, should have been corrected, but again it was not. The Eighth Circuit *chose* not to enforce Rule 11 in this particular case.

IV.

Certiorari should issue because the Eighth Circuit's refusal to enforce Fed. R. Civ. P. 11 in this case was an abdication of its judicial and constitutional duty to faithfully interpret and apply the law, and such refusal is a departure so far from the usual and accepted course of judicial proceedings that it calls for the exercise of this Court's supervisory power, and because the refusal denied Petitioner "Equal Justice Under Law."

The Eighth Circuit's refusal to enforce the black letter law of Rule 11 was a refusal to carry out the court's judicial and constitutional duty to faithfully interpret and apply the law. It was a departure so far from the usual and accepted course of judicial proceedings within the meaning of Supreme Court Rule 10(a) that it calls for the exercise of this Court's supervisory power.

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[8] Respondent Mr. Thomas J. O'Neal was the chief attorney who handled the defense against Debtors' motions for his removal and for the denial of his compensation in the courts below.

Refusing to enforce the black letter law of Rule 11 in this case also denied Petitioner of the equal protection of the law and "Equal Justice Under Law." Petitioner was entitled to the protection of Rule 11 in the same manner as he was subject to the sting of its sanctions. As a citizen of this great nation known for the rule of law, Petitioner had a legitimate expectation that Rule 11 would be followed and applied in his case as it should in every other case. When this legitimate expectation was shattered, not only did Petitioner suffer, so did the rule of law.

Lastly, by refusing to enforce Rule 11 and to reverse the district court's sanctions when the same were clearly in violation of Rule 11, the Eighth Circuit put Petitioner in a position of either to swallow the improper sanctions or to undertake the enormous task of seeking a writ from this Court, knowing that this Court would grant certiorari in only a minimal number of cases. That was entirely improper.

V.

Certiorari should issue because there is a conflict between the Eighth Circuit and Seventh Circuit in regard to whether a court may sanction counsel for making a legal contention which is supported by specific case law. In addition, certiorari should issue because the bankruptcy court abused discretion in sanctioning Petitioner for pointing out the court's contradiction on a factual issue bearing on the vital right of Debtors and because the Eighth Circuit refused to correct said abuse.

By order of June 5, 1996, the bankruptcy court imposed sanctions of over $5,358.78 against Petitioner under Fed. R. Fed. P. 9011. For what legal contentions was Petitioner sanctioned?

A. The Bankruptcy Code prohibits an involuntary chapter 7 case against a family farmer.

One of the legal contentions for which Petitioner was sanctioned is that the involuntary chapter 7 case against Debtors, who were family farmers, should be dismissed because the Bankruptcy Code, specifically section 303(a), prohibits such a case.[9] The statute entitled "Involuntary cases" provides:

> (a) An involuntary case may be commenced only under chapter 7 . . . only against a person, *except* a farmer, a *family farmer*, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced. (Emphasis added).

Consistent with section 303(a) and in direct support of Debtors' contention is *In re Mandalay Shores*, 62 B.R. 758, 760 (Bankr. M.D. Fla. 1986), where the court held:

> because the Debtor is not a moneyed, business or commercial corporation, it was not eligible to be an involuntary debtor under Chapter 7 by virtue of §303(a) of the Bankruptcy Code, and because it was unwilling to convert, this Court had no choice but to enter an order of dismissal . . . .

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[9] Protecting farmers from involuntary liquidation has been a long standing policy of the Bankruptcy Code. See *In re Lange*, 39 B.R. 483, 483-484 (Bankr. Kan. 1984). For a criticism of *In re Graven*, 936 F.2d 378 (8th Cir. 1991), see *In re Davenport*, 175 B.R. 355 (Bankr. E.D. Cal. 1994).

Mandalay Shores stands for the proposition that a person or entity that is protected under section 303(a) from an involuntary chapter 7 case can not be forced into chapter 7 proceeding by way of conversion. Even the bankruptcy judge acknowledged that this contention had some merit or logical appeal because at the 01/22/1996 hearing on Debtors' motion to stay, the court said the following, after Petitioner pointed out the *Mandalay Shores* case,

> Well, you [referring to Petitioner] may be right, but I don't think so. As I say, it strikes me that it's a little bit late to be raising this particular issue. . . . Because I don't think it's a constitutional question as such. Maybe I'm wrong . . . but you don't have a conflict [between the circuits] . . . . How are you going to get to the Supreme Court?[10]

In *Matter of Excello Press, Inc.*, 967 F.2d 1109, 1115 (7th Cir. 1992), the Seventh Circuit held that when a party had specific authority to rely on, the party and his counsel should not be sanctioned, even though the cited authority represented only the minority view. This is consistent with Advisory Committee Note on the 1993 Amendment to Rule 11 which states "the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions . . . should certainly be taken into account in determining whether" Rule 11(2) has been violated.

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[10] It was only after Petitioner sought the recusal of the bankruptcy judge and only after Petitioner pointed out the judge's contradictory findings and rulings with respect to Debtors' intent to hinder, delay and defraud creditors did the bankruptcy judge decide to sanction Petitioner. For discussion of the bankruptcy court's contradiction, See *infra* 23-27.

In imposing Rule 9011 sanctions against Petitioner, the bankruptcy court never mentioned the *Mandalay Shores* case, neither did the district court nor did the Eighth Circuit in affirming the bankruptcy court's sanctions. In effect, the Eighth Circuit has held, contrary to the Seventh Circuit's holding in *Matter of Excello Press, Inc.*, that counsel may be sanctioned for making a legal contention even though the contention is supported by specific case law. This Court should issue certiorari to resolve the conflict between the two circuits and to make it very clear that it is an abuse of discretion for a court to sanction a party or a party's counsel for making a legal contention which is supported by specific case law.

In entering sanctions, the bankruptcy court also mischaracterized Petitioner's position. It stated that Debtors argued that family farmers could not be debtors under chapter 7. (37a). That, however, was not Petitioner's argument. Petitioner's contention was that a family farmer could not be debtor under chapter 7 *if he or she opposed the chapter 7 case*. (51a, para. 17). In the words of the *Mandalay Shores* court, a debtor who is protected under section 303(a) is not eligible to be a debtor under chapter 7 or 11 if he opposes the chapter 7 or 11 case. It was fundamentally unfair for the bankruptcy court to mischaracterize Petitioner's argument and then to impose sanctions based on the mischaracterization.

The bankruptcy court also distinguished "involuntary conversion" from "involuntary commencement," stating that section 303 prohibits the latter but not the former. (36a). "Conversion", however, is the end of a case under one chapter and the "commencement" of another case under another chapter. The bankruptcy court simply elevated form over substance. The clear intent of Congress in adding family

farmers to the list of protected class under section 303(a) was to shield family farmers from involuntary chapter 7 cases.[11] The fact that an involuntary chapter 7 case resulting from forced conversion, rather than from "commencement" does not change the fact that the chapter 7 case is involuntary and, as such, it is prohibited by section 303(a).

The lower courts stated that Debtors were trying to relitigate issues which had been previously decided and which were governed by the law of the case. First of all, none of the courts had ever addressed the section 303(a) argument before Debtors' independent action. In its 01/31/1996 order denying Debtors' motion to stay, the bankruptcy court acknowledged that the 303(a) argument was an argument that had not been advanced "before any of the prior courts." Secondly, the law of the case doctrine is judicially created. As such, it must yield to Fed. R. Civ. P. 60(b) which allows a party to seek relief from a judgment, order and proceeding. If, as Petitioner had argued, section 303(a) prohibited an involuntary chapter 7 case against a family farmer, Debtors were entitled to be relieved from the involuntary proceeding. Rigid application of the law of the case doctrine would render Rule 60(b) meaningless. Lastly, even if the law of the case doctrine was applicable so as to preclude considering the section 303(a) argument, it did not automatically call for

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[11] Section 303(a) is entitled "involuntary cases". The focus of the statute, therefore, is on the involuntary nature of the chapter 7 case, not on the manner of commencement. Section 103 of the Bankruptcy Code provides that "[e]xcept as provided in section 1161 of this title, chapter 1, 3 and 5 of this title apply in a case under chapter 7, 11, 12 or 13 of this title." Section 303(a), as a general provision under the code, applies and should be considered in deciding whether a court may start an involuntary chapter 7 case against a family farmer by way of involuntary conversion.

sanctions in this case. The merit and plausibility of Petitioner's argument must be considered before sanctions could be imposed.

The bankruptcy court stated that Petitioner's 303(a) argument "is so stretched, it defies logic." (42a). The *Mandalay Shores* court, however, did not believe that its interpretation of §303(a) defied logic. On an issue so important as whether farmers and family farmers could be forced into chapter 7 liquidation by way of conversion, there could be more than one view. To impose sanctions on Petitioner for arguing a position that was contrary to the bankruptcy court's own was an abuse of discretion and was entirely improper.

B. The contradictory findings and rulings with respect to Debtors' intent to hinder, delay and defraud creditors

The bankruptcy court's contradiction on the issue of Debtors' intent to hinder, delay or defraud creditors is apparent from the court's two memorandum opinions, *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989) (App. P) and *In re Graven,* 138 B.R. 587 (Bankr. W.D. Mo. 1992) (App. Q). In 1989, the bankruptcy court converted Debtors' chapter 12 case to a case under chapter 7 against Debtors' will after a finding that by the pre-petition transfers, all of which were listed at the end of the court's opinion, Debtors had engaged in "a clear pattern of deliberate fraud perpetrated with the intent to hinder, delay and defraud the creditors of the debtors" (80a). Almost three years later, when the trustee sought summary judgment to have the alleged fraudulent transfers set aside, the bankruptcy court said:

> The Court may grant Trustee's motion for summary judgment only if "there is no

> genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law". . . . The Trustee can not use the doctrine of collateral estoppel [relying on *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989)] to satisfy the element of intent to hinder, delay, or defraud creditors. The element of intent is a *factual issue*, therefore, there exists a *factual dispute* as to that element in Counts I, III, and IX which are based on Mo. Rev. Stat. §428.020 and §§548(a)(1) and 727(a)(2) of the Bankruptcy Code. [Emphasis added]
>
> As to Count II, that count requests turnover of the subject property under §542(a). The effect of §542(a) is to compel those in possession of the estate property to turnover such property to the trustee. [Citation omitted]. This depends on a finding in Count I that the subject property transfers were void under MO. Rev. Stat. 428.020. Because the Court can not grant Trustee's motion as to Count I, there exists a *factual issue* as to whether the subject property is property of the estate. [Italics added].
>
> CONCLUSION
>
> For the foregoing reasons, *factual dispute* exists as to Counts I, II, III, and IX, therefore, trustee's motion for summary judgment must be DENIED. [Italics added].

(89a-90a).

The legal contention Petitioner raised for Debtors' relief from the involuntary chapter 7 case was that if the bankruptcy court could not find an intent to hinder, delay and

defraud creditors in 1992 when the trustee sought summary judgment, it could not have found the same in 1989 when it forced Debtors into chapter 7 proceeding. Because a finding of fraud was required under section 1208(d) for conversion, fundamental fairness dictated that Debtors be freed from the involuntary chapter 7 case.

Not only did he point out the contradiction, Petitioner also explained how the contradiction occurred: It occurred because there was no adequate procedure for the bankruptcy court to deal with the issue of fraudulent conveyance at the time of conversion. When the trustee moved to convert in 1989, he had not filed a complaint to set aside the alleged fraudulent transfers. The transferees were not parties to the conversion proceeding. The bankruptcy court conducted no trial on the issue of fraudulent conveyance but merely a motion hearing. The hearing lasted for less than an hour. No witness was called at the hearing. But in a *hurried* effort to force Debtors into chapter 7 proceeding, the bankruptcy court *jumped* to the conclusion that Debtors had transferred assets with the intent to hinder, delay and defraud their creditors. The court did not realize that it could not, for reasons of due process, make a finding of fraudulent conveyance without the transferee being first made a party. It was only when the trustee sought summary judgment in reliance upon *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989), did the bankruptcy court realize the problem and find itself in a position that it had to deny the trustee's motion for summary judgment.

In its 1992 opinion, the bankruptcy court also stated:

> Before the doctrine of collateral estoppel may properly be applied, Defendant must have had, in the prior case, a fair and full opportunity to litigate the same issue [the element of intent to

> hinder, delay and defraud creditors] under present consideration. Defendants [referring to Debtors] simply had no such opportunity . . . .

(88a). This statement acknowledged the inadequacy of the procedure to deal with the fraudulent conveyance issue in 1989. It also acknowledged that Debtors had been forced into chapter 7 before they had a "fair and full" opportunity to litigate the intent issue.[12]

The bankruptcy court stated that there was no contradiction because the issue of intent in 1989 was different from that presented in the trustee's motion for summary judgment in 1992. (37a-40a). This explanation is contrary to *In re Graven*, 84 B.R. 630(Bankr. W.D. Mo. 1988)(App. O, 71a-75a), where the bankruptcy court ordered the investigation of Debtors' pre-petition transfers out of a concern that the same might have been in fraud of creditors under Missouri Fraudulent Conveyance Act, §428.020 RSMo. It is also contrary to *In re Graven*, 64 F.3d 453, 455-56 (8th Cir. 1995), where the Eighth Circuit said:

> [I]n our view, this case [adversary proceeding to set aside Debtors' pre-petition transfers as fraudulent conveyances] involves the same facts and the same legal standard involved in Graven I [conversion

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[12] Even though the bankruptcy court acknowledged that Debtors had not had a full and fair opportunity to litigate the intent issue before the involuntary conversion, and even though it held that summary judgment for the trustee was not proper and that a trial was required on the trustee's fraudulent conveyance claim, the bankruptcy court's 1989 opinion, affirmed by *In re Graven*, 936 F.2d 378 (8th Cir. 1991), had in effect decided the case against Debtors and the transferees for all practical purposes. Everything said or done after the 1989 decision was merely an exercise.

> proceeding]. While the bankruptcy code sections involved in the two cases are different--in Graven I, the issue was whether under section 1208(d) the Gravens engaged in fraudulent activity that would justify converting the case from chapter 12 to chapter 7, and in this case the trustee seeks to recover fraudulent transfers under either section 548(a) or section 544(b)--the governing legal standards are identical. In Graven I, we looked to the legal standards for fraudulent conveyances under section 548(a)(1) and under Missouri law . . . to determine whether the Gravens had engaged in fraudulent activity for purposes of section 1208(d). Both section 548(a) and Missouri law define fraudulent conveyances as those conveyances made with the "intent to hinder, delay or defraud" creditors. (Italics added).

We are all human, and we all make mistakes. The question is whether we allow others to say that we have made a mistake. Without doubt, Petitioner pointed out some of the mistakes, contradictions, and irregularities that had occurred in the past proceedings of this case. But punishing Petitioner with court sanctions for pointing out the court's mistake and contradiction on a factual issue bearing on the vital right of Debtors, whom Petitioner was to vigorously represent, was, Petitioner respectfully submits, an abuse of discretion and violated Fed. R. Bankr. P. 9011.

Petitioner immigrated to the United States over ten years ago and later became a naturalized citizen. He studied law in his native country and again in the United States. He had heard that the greatness of the American judicial system lay in the power of the pen of its courts. But all that Petitioner has learned in this case, by the way, his first federal case, is the blunt power of court sanctions--the power of a court to

enter sanctions *without a reasoned opinion* that sets forth the facts and explains why an attorney and his clients are sanctioned. It had made him ask: "Is this reflective of our American judicial system?" His answer was, "No, it could not be." Thus comes this Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth in this petition, this Court should grant certiorari to reverse all sanctions entered against Petitioner because the same violated Fed. R. Civ. P. 11 and Fed. R. Bankr. P. 9011, violated Petitioner's Fifth Amendment right to due process, and were an abuse of discretion.

Respectfully submitted,

Jianbin "Jim" Wei, *Pro se*
305 E. Walnut St., Ste. 111-LL
Springfield, Missouri 65806
(417)831-0393

APPENDIX

Appendix A-Decision of U.S. Court of Appeals for the Eighth Circuit dated and filed July 27, 1999

United States Court of Appeals for the Eighth Circuit

Appeal No. 98-1261

In re:

BOBBY NOAH GRAVEN and BOBBY F. GRAVEN, Personal Representative of the Estate of Millie Ann Graven, Deceased, Debtors.

BOBBY NOAH GRAVEN and BOBBY F. GRAVEN, Personal Representative of the Estate of Millie Ann Graven, Deceased, and JIANBIN "JIM" WEI, Movant/Appellant,

vs.

RICHARD V. FINK, Trustee, Defendant/Appellee,

BOB W. CROUCH, Respondent/Appellee,

FARMERLAND[SIC] MUTUAL INSURANCE CO. OF DADE COUNTY, Respondent, and

THOMAS J. O'NEAL, Interested Party.

Appeal from the United States District Court for the Western District of Missouri

Submitted: March 10, 1999

Filed: July 27, 1999

Appendix A

Before McMILLIAN and MORRIS SHEPARD ARNOLD, Circuit Judges and NANGLE,[1] District Judge

McMILLIAN, Circuit Judge

This is a consolidated appeal arising in a bankruptcy matter with a long and complex history. See Fink v. Graven Auction Co. (In re Graven), 64 F.3d 453 (8th Cir. 1995), cert. denied, 517 U.S. 1189 (1996); Graven v. Fink (In re Graven), 936 F.2d 378 (8th Cir. 1991). Bobby N. Graven and Bobby F. Graven[2] (debtors), and their present attorney, Jianbin "Jim" Wei, now appeal from two final orders entered in the United States District Court[3] for the Western District of Missouri, affirming orders of the bankruptcy court[4] and granting additional relief to the trustee, Richard V. Fink (the trustee). See Graven v. Fink(In re Graven), No. 96-3388-CV-S-3 (W.D. Mo. Nov. 7, 1997) (affirming bankruptcy court's order and additionally imposing sanctions against debtors and their attorney pursuant to Fed. R. Civ. P. 11), aff'g 196 B.R. 506 (Bankr. W.D. Mo. 1996) (dismissing debtors' complaint entitled "Independent Action for Relief from Bankruptcy Proceedings, Judgments, and Orders" filed in Civ. No. 96-338[sic] and imposing sanctions against debtors and their attorney under Fed. R. Bankr. P. 9011(a)); id., Nos. 96-3388-CV - S3/ 97-3044-CV-S-3 (W.D. Mo. Nov. 17, 1997), aff'g

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[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

[2] Millie Anne[sic] Graven was originally a party to the present litigation but died during the course of the proceedings. Bobby F. Graven was substituted as her personal representative.

[3] The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

[4] The Honorable Frank W. Koger, Chief Judge, United States Bankruptcy Court for the Western District of Missouri.

Appendix A

No. 87-04885(Bankr. W.D. Mo. March 7, 1997) (amended order denying motion entitled "Amended Motion (1) to Rescind Orders Authorizing Certain Creditors to Guarantee the Payment of Trustee's Attorney's Fees; (2) to Remove Trustee and Trustee's Attorney under §324(a); and (3) for Denial of All Compensation to Trustee's Attorney" filed in Civ. No. 97-3044). For reversal, debtors argue that the bankruptcy court erred in refusing to recuse itself, dismissing count I of the first amended complaint in Civ. 96-3388, dismissing Count II of the first amended complaint in Civ. No. 96-3388, ordering them to pay sanctions under Fed. R. Bankr. P. 9011(a), denying their motion to remove the trustee and the trustee's attorney, awarding attorney's fees to the trustee, denying their motion for attorneys' fees, allowing creditors to guarantee payment of the trustee's attorney's fees, and denying their motion to compel. Debtors further argue that the district court erred in imposing sanctions against them under Fed. R. Civ. P. 11. Debtors' attorney, Wei, joins the appeal to seek relief from the sanctions for which he has been ordered jointly and severally liable.

Jurisdiction was proper in the district court under 28 U.S.C. §158(a). Jurisdiction is proper in this court under 28 U.S.C. §158(d). The notice of appeal was timely filed pursuant to Fed. R. App. P. 4(a) and 6(a).

We have carefully reviewed debtors' legal arguments in this appeal and find them to be without merit, Debtors are attempting to relitigate issues that have been previously decided by this court and are now governed by the law of the case. As to those issues not previously addressed by this court, we are of the opinion that they have been fully and correctly addressed below. We also believe that the district

court and bankruptcy court were justified in imposing sanctions against debtors and that they have treated debtors fairly under the circumstances of this case. Although we have some doubts about the fairness of imposing sanctions jointly and severally against Wei, we can not say that the lower courts abused their discretion in so doing.

In sum, because the district court and bankruptcy court have thoroughly explained their legal conclusions and have adequately justified their sanctions, and no error has occurred, we conclude that further discussion is not warranted. The orders of the district court are affirmed. See 8th Cir. R. 47B.

Also before this court is the trustee's "Motion to Dismiss and for Sanctions," filed in this court in response to the present consolidated appeal. Upon consideration of that motion, we order debtors to pay the trustee's reasonable attorney's fees and expenses incurred in defending this consolidated appeal.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

Appendix B-U.S. District Court Order dated and filed November 7, 1997

United States District Court for the Western District of Missouri, Southern Division

In re:	)	
BOBBY NOAH GRAVEN and	)	
BOBBY F. GRAVEN, Personal	)	Bankruptcy Case
Representative of the Estate of	)	No. 87-04885
Millie Ann Graven, Deceased,	)	
Debtors.	)	
---	---	---
BOBBY NOAH GRAVEN	)	Adversary No.
BOBBY F. GRAVEN,	)	95-06077
Personal Representative	)	
of the Estate of Millie Ann Graven,	)	Case No.
Deceased, and	)	96-3388-CV-S-3
JIANBIN "JIM" WEI,	)	Case No.
Appellants,	)	97-3044-CV-S
vs.	)	
RICHARD V. FINK, Trustee,	)	
Defendant/Appellee.	)	

ORDER AFFIRMING UNITED STATES BANKRUPTCY COURT'S RULING, IMPOSING SANCTIONS AGAINST THE DEBTORS/APPELLANTS AND OVERRULING APPELLEE'S MOTION TO DISMISS AND FOR SANCTIONS

Pending is an appeal of the bankruptcy Court's decision denying relief from[sic] the Debtors First Amended Complaint for Independent Action for Relief From Bankruptcy Proceedings, Judgments and Orders (Doc. 5 and 8). Also pending is a Motion by the Trustee to Dismiss the

appeal(Doc. #13) and a Motion for Sanctions(Doc. #15). For the reasons set forth below, the Bankruptcy Court's decision is AFFIRMED and Trustee's Motion to Dismiss and For Sanctions are OVERRULED. Additionally, this Court orders sanctions against Debtors and their counsel of attorneys fees and costs. The Trustee is ordered to file an affidavit with the Court calculating the fees and expenses suffered as a result of defending this appeal within 30 days from the date of this order. The Court will then determined the amount of the sanctions. Lastly, the Debtors' Motion to Compel (Doc. #11 in Case file 97-3044) and Motion for Award of Expenses and Costs in Opposing Debtors' Motion to Compel (Doc. #27 in case filed 96-3388) are DENIED as moot and for lack of jurisdiction with this Court.

I. BACKGROUND

This case has been in the bankruptcy system for approximately ten years. The Debtors have filed and refiled motions and appeals with the Bankruptcy Court and with both this Court and the Eighth Circuit Court of Appeals.[1] Debtors current appeal is requesting relief from this Court from denial by the Bankruptcy Court of a Motion to Alter Judgment of the dismissal of Debtors' First Amended Complaint for Independent Action for Relief from Involuntary Chapter 7 Bankruptcy Proceedings, Judgments and Orders. This appeal contains a repeat of the same fundamental claim that was the basis of this case from the

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[1] This Court sees no reason to give a detailed history of the facts when several previous decisions by this Court and the Eighth Circuit, as well as the record on appeal, provide the exhaustive history. See In re Graven, 101 B.R. 109 (Bankr. W.D. Mo. 1989); Graven v. Fink (In re Graven), 936 F.2d 378 (8th Cir. 1991).

beginning. The Debtors have come once again appealed the very same underlying issue that has been previously decided by both this Court and the Eighth Circuit Court of Appeals.

This particular appeal originated as an adversary case filed by the Debtors before the United States Bankruptcy for the Western District of Missouri. The Debtors filed a First Amended Complaint for Independent Action for Relief from Involuntary Chapter 7 Bankruptcy Proceedings, Judgments and Orders, which was dismissed by the Bankruptcy Court on June 5, 1996. Also included within the First Amended Complaint was Renewal of Motion to Disqualify Judge Koger from the case, which was also denied. Then the Debtors filed a Motion to Alter Judgment pursuant to Bankruptcy Rule 9023 on June 14, 1996, which was denied by an Order entered by the Bankruptcy Court on June 24, 1996. the notice of this appeal followed on July 3, 1996. A Motion to Dismiss this appeal and a Motion for Sanctions were filed by the Trustee on November 29, 1996.

The Debtors have four separate claims on appeal. They claim:

1. The Honorable Judge Koger should have recused from the case,
2. The Bankruptcy Court erred in dismissing Debtors' First Amended Complaint for Independent Action for Relief from Involuntary Chapter 7 Bankruptcy Proceedings, Judgments and Orders,
3. The Bankruptcy Court erred in imposing Rule 9011 sanctions against Debtors and their counsel, and
4. The Bankruptcy Court erred in refusing to impose sanctions on the Trustee and Trustee's attorney.

The Debtor's claims are addressed below.

Appendix B

II. DISCUSSION

A. Recusal

The Debtors claim that Judge Koger erred in refusing to recuse himself from hearing and deciding the Debtors' Independent Action for Relief from Involuntary Chapter 7 Bankruptcy proceedings, Judgments and Orders. A federal judge has the duty to recuse him or herself under 28 U.S.C. §455(a)(1988). In re Hale, 980 F.2d 1176,1178(8th Cir. 1992). "A motion for recusal rests in the 'sound discretion of the trial judge and the standard of review on appeal is whether the judge abused his or her discretion.'" Id (quoting United States v. Walker, 920 F.2d 513, 516 (8th Cir. 1990)). The judge is presumed to be impartial, and the party seeking recusal bears the substantial burden of proving otherwise. United States v. Walker, 920 F.2d 513, 517 (8th Cir. 1990); Pope v. Federal Express Corp., 974 F.2d 982, 985 (8th Cir. 1991). Under 28 U.S.C. §455(a) a judge should disqualify himself or herself when his or her impartiality might reasonably be questioned. Pope, 974 F.2d at 985 (citing Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1329 (8th Cir. 1985).

The Debtors argue that Judge Koger should have recused himself from ruling on their Motion because he contradicted himself in his prior rulings on their case, he received ex-parte communication from the Trustee's attorney and because he had a predisposition of the legal issues on the merits of their Motion. The Court disagrees.

The Debtors arguments regarding Judge Koger's prior rulings are without merit. The Eighth Circuit Court of Appeals affirmed both rulings the Debtor's[sic] contend were

contradictory.[2] The Debtor's attempt to use those decisions to require Judge Koger to recuse himself thereby causing the case to be transferred to another which would ultimately cause more delay and confusion of this case. The Debtors provided no evidence to this Court showing that Judge abused his discretion in refusing to disqualify himself. "More than fear of impropriety is required before disqualification is necessary" and since the Debtors' basis for recusal were twice decided by this Court and the Court of Appeals, they have no evidence supporting recusal. United States v. Hollis, 718 F.2d 277, 280 (1983), cert. denied, 465 U.S. 1036 (1984).

After an independent review of the record and the parties briefs, this Court finds that Judge Koger did not abuse discretion in refusing to recuse himself from ruling on this case.

B. Dismissal of independent action and sanctions

"Findings of fact, whether based on oral or documentary evidence, shall not e set aside unless clearly erroneous." Bankruptcy Rule 8013. The Bankruptcy Court's legal conclusions are reviewed de novo. In re Montgomery, 37 F.3d 413, 414-45 (8th Cir. 1994).

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[2] The two supposed contradictory decisions are In re Graven, 101 B.R. 109 (Bankr. W.D. Mo. 1989) and In re Graven, 138 B.R. 587 (Bankr. W.D. Mo. 1992). The Eighth Circuit affirmed each decision respectively in In re Graven, 936 F.2d 378 (8th Cir. 1991) (affirming the district court's decision that affirmed the bankruptcy ruling) and In re Graven, 64 F.3d 453 (8th Cir. 1995) (affirming this district court's decision that affirmed the bankruptcy ruling).

Appendix B

Based upon an independent review of the record and the parties brief in this matter, this Court affirms the Bankruptcy Court's rulings below for the dismissal of the Debtor's First Amended Complaint for Independent Action for Relief from Involuntary Chapter 7 Bankruptcy Proceedings, Judgments and Orders and the imposition of sanctions against Debtors and their attorney as well as the denial of sanctions against the Trustee and the Trustee's attorney.

C. Sanctions

This Court finds that an award of sanctions are appropriate in this case. Therefore, pursuant to Federal Rules of Civil Procedure 11, the Court imposes sanctions for the cost and reasonable attorney's fees in defending this appeal against Debtors and their attorney, jointly and severally. The Trustee shall provide to the Court an estimation and calculation of costs and fees to the Court for inspection within 30 days from the date of this order so that the Court can determine an appropriate award.

D. Motion to Compel and for Costs

Debtor's Motion to Compel and Robert Crouch's Motion for Award of Expenses and Costs in defending Debtor's Motion to Compel are also pending before this Court. These motions are denied as moot because the Bankruptcy Court has ruled both motions. Additionally, this Court lacks jurisdiction to hear the motions.

III. CONCLUSION

Appendix B

For the reasons set forth in this Order, the Bankruptcy Court is affirmed, the Trustee's Motion to Dismiss and For Sanctions is denied and this Court imposes an award of sanctions against the Debtors and their attorney, Jianbin Wei.

IT IS SO ORDERED.

s/Ortrie D. Smith, Judge
United States District Court

Appendix C-U.S. District Court Order dated and filed November 17, 1997

United States District Court for the Western District of Missouri, Southern Division

In re:	)	
BOBBY NOAH GRAVEN and	)	
BOBBY F. GRAVEN, Personal	)	Bankruptcy Case
Representative of the Estate of	)	No. 87-04885
Millie A. Graven, Deceased, Debtors.)		

BOBBY NOAH GRAVEN	)	Adversary No.
BOBBY F. GRAVEN,	)	95-06077
Personal Rep. of the Estate of	)	
Millie Ann Graven, Deceased, and	)	Case No.
JIANBIN "JIM" WEI,	)	96-3388-CV-S-3
Appellants,	)	Case No.
vs.	)	97-3044-CV-S
RICHARD V. FINK, Trustee,	)	
Defendant/Appellee.	)	

ORDER AFFIRMING UNITED STATES BANKRUPTCY COURT'S RULING

Pending is an appeal of the Bankruptcy Court's decision denying relief from[sic] the Debtors' Motion to Remove Trustee and his Attorney; for denial of all compensation to the trustee's attorney, and for several other related motions (Doc. #6 in case number 97-3044, now consolidated with case 96-3388). After a review of the record and the parties briefs in the matter, the Bankruptcy Court's decision is AFFIRMED.

IT IS SO ORDERED.

Date: 11/7/97

s/ Ortrie D. Smith, Judge
United State District Court

Appendix D-U.S. District Court Order dated and filed November January 27, 1998

United States District Court for the Western District of Missouri, Southern Division

In re:	)	
BOBBY NOAH GRAVEN and	)	
BOBBY F. GRAVEN, Personal	)	Bankruptcy Case
Representative of the Estate of	)	No. 87-04885
Millie Ann Graven, Deceased,	)	
Debtors.	)	

BOBBY NOAH GRAVEN	)	Adversary No.
BOBBY F. GRAVEN,	)	95-06077
Personal Representative	)	
of the Estate of Millie Ann Graven,	)	Case No.
Deceased, and	)	96-3388-CV-S-3
JIANBIN "JIM" WEI,	)	Case No.
Appellants,	)	97-3044-CV-S
vs.	)	
RICHARD V. FINK, Trustee,	)	
Defendant/Appellee.	)	

ORDER AWARDING SANCTIONS

Pending is Appellants Amended Motion for Rehearing (Doc. #35). The Motion is DENIED. Also pending before the Court is the Affidavit of fees and expenses incurred by the Trustee in this consolidated appeal, filed with the Court pursuant to an award of sanctions against Debtors' attorney. After a review of the Affidavit this Court imposes the award of sanctions against Debtors and their attorney jointly and severally in the amount of ten thousand two

hundred thirty five dollars and no cents ($10,235.00). The Court has examined the amount of time and rates charged by the attorneys and concludes they are reasonable.

IT IS SO ORDERED.

Date: 1/27/98.

s/Ortrie D. Smith, Judge
United States District Court

Appendix E-Bankruptcy Court's Amended Order dated and filed March 7, 1997 (Bankruptcy Court Order in case No. 97-3044)

In re:	)	
BOBBY NOAH GRAVEN and	)	
BOBBY F. GRAVEN, Personal	)	Bankruptcy Case
Representative of the Estate of	)	No. 87-04885
Millie Ann Graven, Deceased,	)	
Debtors.	)	

AMENDED ORDER

Debtor has filed three motions with this Court in relation to this case, namely:

1) Motion to Compel filed by Debtor requesting that the trustee's attorney be required to produce complete and detailed bulling and accounting of its fees paid by certain secured creditors;

2) Motion to (1) Rescind Orders Authorizing Certain Creditors to Guarantee the Payment of Trustee's Attorney's Fees; (2) to Remove Trustee and Trustee's Attorney under §324(a); and (3) for Denial of all compensation to Trustee's attorney;

3) Motion for Temporary Restraining Order filed by Debtor requesting that the trustee and the trustee's attorney be restrained from taking further action in those capacities until the second motion above was heard and ruled upon.

All three of those motions were heard by this Court on October 21, 1996, at which time this Court entered oral rulings on all but two of the issues. This order proposes to rule on those two issues as well as to memorialize those rulings made orally at the hearing.

Appendix E

Initially, the Court notes Debtors had filed a motion to continue the hearing on the second motion, the motion to remove the trustee. Apparently, the U.S. Trustee's Office and the Trustee agreed to the continuance, but on the mistaken belief that all of the pending motions would be continued. When alerted to the misunderstanding between Debtors' counsel and the U.S. Trustee's Office, the U.S. Trustee's Office withdrew its consent to the continuance on the basis that it did not want to waste resources in defending the motions in a piecemeal fashion, particularly because several of the parties were required to travel to Kansas City from Springfield, Missouri, to attend the hearings. At the October 21 hearing, Debtors' counsel reiterated that he wished to go ahead and present his case on all of the motions except the Motion to Remove Trustee, which motion he still desired to be continued. At that time, this Court agreed that all of the matters should be heard together and gave Debtors' counsel the option of continuing all of them or presenting all of them at that time. Debtors' counsel chose to proceed and to present his case on all of the matters at that time.

As another preliminary matter, at the October 21 hearing, Trustee's counsel, Thomas O'Neal, filed a Motion to Quash a subpoena which had been served upon him by Debtors' counsel on October 18, 1996. This subpoena had required Mr. O'Neal to be present at the October 21 hearing and required that he bring certain enumerated documents to the hearing. The subpoena requested certain documents regarding the representation of Farmers Mutual Insurance Co. of Dade County by Mr. Bob Crouch, who at the time of the representation was a member of Mr. O'Neal's law firm, concerning a loss claim made by Graven Auction Co., Inc., as a result of a fire which occurred at a piece of property located at 503 Carlton, Mountain Grove, Missouri, in December of

1988. The evidence at the hearing was that Bob W. Crouch, a former partner of Mr. O'Neal, represented the insurance company in that litigation which resulted in a settlement, despite a potential conflict of interest due to Mr. O'Neal's involvement in the Gravens' bankruptcy case. In the subpoena, Debtors' counsel requested certain files, letters, billing and accounting records related to that fire-related representation.

However, Mr. O'Neal stated that after the law firm to which both Mr. Crouch and Mr. O'Neal belonged had dissolved, Mr. Crouch and Mr. O'Neal each became partners in separate law firms. In so doing, each of them took their own files with them to their respective new firms. As a result, Mr. O'Neal stated he did not have possession of several of the documents related to the fire loss representation because since it was Mr. Crouch's case, Mr. Crouch had taken those files with him to his new firm. As to those documents which Mr. O'Neal declared he was not in possession, this Court granted Mr. O'Neal's motion to quash and directed Debtors' counsel to subpoena Mr. Crouch if he still desired those documents.[1]

As to the documents Mr. O'Neal had in his possession, this Court ordered him to turn over to Debtors' Counsel.[2] One of the requested items was quashed as it was

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[1]Debtors' counsel was directed to subpoena Mr. Crouch regarding the following items requested as listed in the subpoena: Item #1, 2, 4, 6, and 7.

[2] Mr. O'Neal was ordered to turn over Items #3, 5, 8, 10, 11 and one 1992 letter described in #12 from R. Bender regarding a settlement offer. (Item #5 requested in a letter from Scott B. Stinson to Bob Crouch dated March 29, 1990). Mr. O'Neal testified that although the letter had been addressed

overly broad in scope.[3] One request was quashed because Mr. O'Neal testified he was not aware of any document fitting the description contained in that request, nor would Mr. Crouch possess such a document.[4]

Motion to Compel Trustee's Attorney
to Provide Detailed Billing and Accounting of Fees

As to the motion to compel the trustee's attorney to provide a detailed billing and accounting of his fees which were paid by certain secured creditors, the trustee's attorney was ordered at the hearing to provide photocopies to the Graven's attorney of billing statements related to its representation of the trustee in this case. The Gravens' attorney was directed at the hearing to provide the Court with an order memorializing that decision; therefore, it is not necessary for the Court to address and decide that issue again herein. The parties are directed to refer to the separate order on the motion to compel the trustee's attorney to provide these documents.

Motion to (1) Rescind Orders Authorizing Certain Creditors
to Guarantee the Payment of Trustee's Attorney's Fees; (2) to

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to and had been in the possession of Mr. Crouch, he obtained the letter from Mr. Crouch just prior to this Court's hearing. It was attached to an affidavit by Mr. Crouch. As it was in Mr. O'Neal's possession at the hearing, it was ordered to be turned over to Debtors.)

[3] Item #9, which requested all of the billing records of Bussell, O'Neal & Hall, formerly Bussell, Hough, O'Neal, Crouch & Hall other than those records which had been turned over to Debtors, was deemed too broad.

[4] Item #13.

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Remove Trustee and Trustee's Attorney under §324(a); and (3) for Denial of All Compensation to Trustee's Attorney

As to this motion, attention was focused at the hearing on the conflict descried above wherein a former partner of the trustee's attorney, Mr. Crouch, represented the Gravens' insurance company in a fire-related litigation at the same time the trustee's attorney, Mr. O'Neal was representing the trustee in this bankruptcy.

The testimony at the hearing revealed that the Gravens filed their chapter 2 petition November 12, 1987. In March, 1988, this Court ordered an investigation by the trustee into the possibility that the Gravens had engaged in fraudulent conduct. The trustee began seeking advice from counsel and [sic] on May 5, 1988, and this Court entered an order authorizing the trustee's employment of Mr. O'Neal as his counsel in the chapter 12 case and authorizing certain secured creditors to guarantee payment of his fees. In November, 1988, and January, 1989, the trustee submitted to the Court his reports indicating the possibility and belief that the Gravens had engaged in several fraudulent transfers of assets. Subsequently, the case was converted to Chapter 7, contrary to Gravens' wishes, and substantial controversies regarding the conversion of the case arose.

Meanwhile, in late 1988, Graven Auction experienced a fire at 503 Carlton, Mountain Grove, Missouri, which the trustee claimed to belong to the bankruptcy estate because the debtors had, according the trustee, fraudulently conveyed it to Graven Auction. In early 1989, Farmers Mutual Insurance Company, the insurance company insuring the property, engaged Mr. Crouch, who was then a member of Mr.

O'Neal's law firm, to represent it concerning the fire loss claim. On January 25, 1989, Debtor Bobby N. Graven, as President of Graven Auction Company, wrote a letter to Mr. Crouch stating that the law firm Bussell, Hough, O'Neal, Crouch & Hall should be disqualified to represent Farmers because Mr. O'Neal was representing the trustee in his recent personal bankruptcy case.

According to Mr. O'Neal, In January of 1989, after being alerted of the potential conflict of interest, he and Mr. Crouch discussed the conflict and it was Mr. O'Neal's understanding that Mr. Crouch would withdraw from representation of Farmers in the fire litigation. It appears as though Mr. Crouch did, in fact, cease his representation of Farmers, albeit temporarily, at that time.

Then on June 6, 1989, the Court entered another order authorizing the employment of the law firm of Bussell, Hough, O'Neal, Crouch & Hall by the trustee to provide legal services in relation to the trustee's representation of the estate in the newly converted Chapter 7 case. Again, the firm's fees were ordered to be guaranteed by three of the Gravens' secured creditors. Subsequently, Mr. Crouch resumed the representation of Farmers Mutual concerning the fire loss and participated in a settlement between Farmers and Graven Auction. The release between Farmers Mutual and Bobby N. Graven[5] was dated April 4, 1990. Farmers issued a check in the amount of $2,500 in settling the fire loss claim.

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[5] Debtors assert that Mr. Crouch drew the release and put the name Bobby N. Graven in the release despite the fact the[sic] Bobby N. Graven made no claim on account of the fire loss.

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On September 30, 1990, the law firm Bussell, Hough, O'Neal, Crouch & Hall dissolved. As discussed above, when the firm dissolved, Mr. O'Neal and Mr. Crouch each took their own files with them to their new firms. According to Mr. O'Neal, he never discussed the fire loss matter with Mr. Crouch after the January, 1989 discussion in which they had agreed Mr. Crouch would not represent Farmers. He stated he did not know that Mr. Crouch had resumed representation of Farmers or that he had participated in the settlement until just prior to this Court's recent hearing when he had a discussion with the U.S. Trustee's office on October 11, 1996.

Motion to Remove Trustee and Trustee's Attorney under §324(a); and for Denial of all Compensation to Trustee's Attorney

Based on this set of circumstances, the Gravens sought to have the trustee and his attorney removed under §324(a), due to the conflict of interest involving Mr. O'Neal's representation of the trustee and Mr. Crouch's representation of Farmers and his failure to disclose this conflict of interest to the Court.

At the October 21 hearing, Ms. Acconcia of the U.S. Trustee's Office declared her position that neither the trustee nor his attorney should be removed. In her opinion, there had been a "Chinese Wall" situation in that even though the conflicting representation had occurred, she was convinced Mr. O'Neal and Mr. Crouch never discussed the case and neither of them gained any benefit from the situation or caused any detriment to the debtors by the situation.

This Court denied the motion to remove trustee at the October 21 hearing for the reason that although an attorney in

a partnership is responsible for the professional conduct of his partners and for monitoring for conflict of interest created by his partners' representation of clients, the facts in this case do not warrant the removal of the trustee or his attorney on those grounds. Immediately upon learning of Mr. Crouch's representation of Farmers in the matter, he requested Mr. Crouch to cease his representation of Farmers. Mr. Crouch agreed and indicated he would so cease his representation of Farmers in the Graven [sic] matter. Mr. O'Neal believed Mr. Crouch had ceased the representation. The Court is convinced that Mr. O'Neal had no knowledge that Mr. Crouch had resumed representation of Farmers or that he had participated in the settlement until only a few weeks ago. Therefore, he could not have disclosed the conflict to the Court because he himself was not aware of it. In fact, it was alleged at the hearing that the only person involved in the bankruptcy proceedings who could have known about the conflict was Mr. Graven who never came forward to point it out until now.

Furthermore, there is no evidence that the estate or the debtors were harmed in any fashion by the conflict, and the Court does not believe any harm occurred. Graven Auction, who according to the Debtors was entitled to the settlement proceeds, apparently received the proceeds and made use of them and no one has alleged that $2,500 settlement was inadequate.

For these reasons, the debtors' motion to remove the trustee and his attorney is DENIED.

Motion to Rescind Orders Authorizing Certain Creditors to Guarantee the Payment of Trustee's Attorney's Fees

Appendix E

The Gravens also seek to rescind this Court's orders authorizing certain creditors to guarantee the payment of the trustee's attorney's fees and authorizing, after review and approval by the Court, for those fees to be allowed super administrative priority claims against the estate. They further seek to have the trustee removed because those orders cause another conflict of interest.

Mr. O'Neal has, in fact, been paid some significant fees by these secured creditors and this Court authorized that they be allowed as super administrative expense claims against the estate in an order entered October 31, 1994.[6] As Mr. O'Neal has pointed out, no one objected then that the fees were to be paid by the secured creditors, and that this is the first time anyone had objected to the fee-paying arrangement, eight years after the first order authorizing the guarantee of the fees and two years after the payment of fees. Nevertheless, the Court will address the argument. Under §327 regarding employment of professional person:

> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

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[6] The October 31, 1994 order allowed as super administrative expense claims against the estate the trustee's attorneys fees in the amount of $41,480.14 paid by Mercantile Wright County Bank; $20,740.06 by Federal Land Bank of St. Louis; and $6,913.36 by Boatmen's Mountain Grove National Bank, totaling $69,133.56.

Appendix E

* * *

> (c) In a case under chapter 7, 12 or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor unless there is objection by another creditor or the United States Trustee, in which case the Court shall disapprove such employment if there is an actual conflict of interest.

According to the court in In re Smartt, 132 B.R. 765(Bankr. D. Colo. 1990), a trustee's attorney is disqualified if he represents an interest which is potentially adverse to the estate.[7]

The Gravens contended that this arrangement is improper because Mr. O'Neal can not be objective if he is being paid by secured creditors and he has in fact undertaken to represent the interest of the paying creditors to the detriment of the debtors. They also assert the orders are improper because they created a potential for the trustee's attorney to pursue financial gains without fear of being unpaid and to prolong the bankruptcy proceedings. They allege particularly that the trustee and his attorney have made intentional misrepresentations to the Court and have concealed facts regarding the characterization of the

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[7] In re Smartt, 132 B.R. 765 (Bankr. D. Colo. 1990), is distinguishable because it involved the disquaIn re Smartt, 132 B.R. 765 (Bankr. D. Colo. 1990), is distinguishable because it involved the disqualification of a trustee who represented himself under § 327(d) in two related bankruptcy cases which had adverse claims against each other.

transfers, so as to prolong the proceedings for their financial gain and to unfairly represent the interest of the secured creditors. They also assert these orders operate to the detriment of the debtors and of small creditors because it allows the attorneys fees paid by the secured creditors to be given super administrative expense status against the bankruptcy estate.

Mr. O'Neal responded at the hearing that in his opinion, it is not the trustee's duty to be completely objective. The trustee's role is to represent the bankruptcy estate, not the debtor. If the estate has an interest which is adverse to that of the debtor, it is the trustee's duty (and therefore the trustee's attorney's duty) to take a course of action which will benefit the estate, even if that course is detrimental to the debtor. He maintained that although the trustee and the debtors are clearly at odds in this case, he and the trustee have never made misrepresentations regarding the debtors' pre-petition conduct in regard to the fraudulent transfers, but rather fulfilled their duty to inform the Court as to what their information revealed. He maintained that he and the trustee, while at odds with the debtors, have fairly represented the interest of the estate and that payment by some of the creditors has not influenced any of their decisions.

Debtors cite Citibank, N.A. v. Andro, 777 F.2d 1192, 1194 (8th Cir. 1981), which states that a trustee in bankruptcy has a fiduciary obligation to treat all parties fairly. They also cite In re Russo, 18 B.R. 257 (Bankr. E.D. N.Y. 1982), in which the debtor sought to have the trustee removed because the trustee also was an executor and residuary beneficiary of the estate of his father who was a judgment creditor of the debtor. That court held that a trustee is an officer of the court and that he may not be the representative of any particu[illegible]

creditor but must represent all creditors without partiality and must assure that all creditors are treated equally. Id. at 270-71. The trustee may not profit in any manner from his handling of the estate. Id. at 271. Further, actual misconduct is not necessary for a trustee's removal. Id.

While the Court does not disagree with any of the above statements of the law as cited by Debtors, it is also true that the trustee and his attorney represent the interest of the estate. In fact, according to the Russo court, the paramount consideration is the welfare of the estate. Id. Furthermore, the Court simply does not believe that the facts of this case warrant the trustee's removal or the removal of the trustee's attorney. Where a debtor has engaged in a historical pattern of conduct intended to harm the estate and/or defraud his creditors, it is impossible for the trustee to represent the debtor's interests as well as the estate's interests. In such a case, it is the trustee's duty to investigate and expose the fraud to the Court and to take steps to "undo" the fraud if possible. This duty necessarily involves taking actions that would be adverse to the debtor's interest. The fact that this seems unfair to the debtors does not warrant the trustee's removal.

In their motion, Debtors point to 18 specific examples of alleged misconducts and conflict of interest created by the trustee's attorney. Without going into the details of each individual allegation, the Court hereby finds that the each allegation is either baseless on its face or was adequately explained by the trustee or his attorney at the hearing. Moreover, many of the allegations involved representations and evidence presented by the trustee to the Court during the litigation of the Gravens' fraudulent transfers. Those allegations of fraudulent transfers have been the subject of

numerous proceedings here in the bankruptcy court, in the district court, and in the Eighth Circuit Court of Appeals. If the trustee was making misrepresentations, Debtors have had ample opportunity to refute the evidence presented and the representations regarding the debtors' fraud made by the trustee in those cases. Despite the extensive litigation in that regard, there has been no evidence of the trustee or his attorney have engaged in any misrepresentation to the Court, and the Court does not believe either of them have done so.

Nor does the Court believe there is a conflict of interest caused by the trustee's attorneys fees being guaranteed by the secured creditors, particularly under the unusual circumstances of this case. This case has been the subject of extensive and sometimes rather heated litigation. It was absolutely necessary for the trustee to be represented by counsel throughout this case and the estate clearly does not possess the funds to pay counsel. The Gravens' suggestion at the hearing that the trustee himself should foot the bill for his legal fees indicates a misunderstanding of the trustee's role in a bankruptcy case and is simply out of the question. Furthermore, despite the Gravens' allegations that it is the trustee who has prolonged this case for the purpose of collecting fees, it is the debtors who have dragged this case through nearly ten years of litigation.

For those reasons, Debtors' motions to rescind orders authorizing certain creditors to guarantee the payment of the trustee's attorneys fees and for denial of all compensation to trustee's attorney is DENIED. Debtors' request for attorneys' fees and sanctions is also DENIED.

Motion for Temporary Restraining Order

Appendix E

This Court's rulings on the other motions at the hearing rendered Debtor's motion for temporary restraining order moot at that time.

So ORDERED this 7th day of March, 1997.

s/Frank W. Koger
Chief Bankruptcy Judge

Appendix F-Bankruptcy Court's Opinion dated and filed June 5, 1996 (Bankruptcy Court Order in case No. 96-3388)

In re:	)	
BOBBY NOAH GRAVEN and	)	
BOBBY F. GRAVEN, Personal	)	Bankruptcy Case
Representative of the Estate of	)	No. 87-04885
Millie Ann Graven, Deceased,	)	
Debtors.	)	
	)	Adversary No.
BOBBY NOAH GRAVEN	)	No. 95-06077
BOBBY F. GRAVEN,	)	
Personal Representative	)	
of the Estate of Millie Ann Graven,	)	
Deceased,	)	
Plaintiffs,	)	
vs.	)	
	)	
RICHARD V. FINK, Trustee	)	
Defendant.	)	

MEMORANDUM OPINION

This adversary proceeding follows an extensive history in the federal court system arising from the filing of a voluntary petition under Chapter 12 of the Bankruptcy Code by Bobby N. Graven and Millie A. Graven, and this Court need not repeat the facts in detail.[1] However, the facts relevant to this adversary are as follows.

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[1] A detailed recitation of the facts may be found in In re Graven, 101 B.R. 109 (Bankr. W.D. Mo. 1989)) and Graven v. Fink (In re Graven), 936 F.2d 378 (8th Cir. 1991).

Appendix F

Bobby N. Graven and Millie A. Graven filed their voluntary petition as family farmers under chapter 12 of the Bankruptcy Code on November 12, 1987. In January, 1988, the Gravens filed a plan of reorganization. Following the request of two of the Gravens' largest creditors, including their largest secured creditors, and following an evidentiary hearing, this Court ordered the trustee to investigate the possibility that the Gravens had committed fraud under the Bankruptcy Code or Missouri law. In re Graven, 84 B.R. 630, 631-32 (Bankr. W.D. Mo. 1988).

After conducting his investigation, the trustee submitted to this Court a preliminary investigation report and a supplemental preliminary report on November 18, 1988 and January 20, 1989, respectively. These reports detailed multiple transactions by the Gravens by which they transferred nearly all of their property to two closely held corporations which were controlled by Bobby N. Graven and of which Bobby N. Graven was the sole shareholder. Bobby N. Graven subsequently transferred the corporation's stock to a family trust. These transfers, which involved rather substantial holdings in real estate and cattle, were made for little or no consideration. The bankruptcy trustee concluded the Gravens had transferred the property with the intent to "hinder, delay, and defraud" their creditors and recommended filing actions to recover the property fraudulently transferred.

At a January 24, 1989, hearing to consider the trustee's reports, the Gravens moved to dismiss their Chapter 12 proceedings under 11 U.S.C. § 1208(b). The trustee filed a motion to convert the case to Chapter 7 based on the alleged fraud by the Gravens. Following a hearing, this Court filed its order in which it held that the Gravens had engaged in a clear pattern of deliberate fraud perpetrated with the intent to

hinder, delay, and defraud [their] creditors . . . ." In re Graven, 101 B.R. 109, 111 (Bankr. W.D. Mo. 1989). Based on this finding, Court granted the trustee's motion and converted the case to Chapter 7 pursuant to § 1208(d). Id. at 113. This Court's decision was affirmed by the District Court for the Western District of Missouri and the U.S. Court of Appeals for the Eighth Circuit. Graven v. Fink (In re Graven), 936 F.2d 378 (8th Cir. 1991) (Graven I). In Graven I, the Eighth Circuit affirmed this Court's holding that a Chapter 12 case could be converted to a Chapter 7 case, and held specifically that this Court's conversion of the Gravens' case was proper because the evidence supported a finding of fraud.

Based on Graven I, the trustee filed a complaint against the Gravens[2] seeking the return of the fraudulently transferred property and seeking a declaration that Graven Auction and Graven Realty functioned as the alter ego of Bobby N. Graven. This Court denied the trustee's motion for summary judgment on the issue of fraudulent conversion [sic] because it determined a factual issue existed as to whether the Gravens had the specific intent to hinder, delay or defraud their creditors. Fink v. Graven (In re Graven), 138 B.R. 587 (Bankr. W.D. Mo. 1992).

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[2]The defendants in that suit included Graven Auction and Graven Realty, the two closely held corporations The defendants in that suit included Graven Auction and Graven Realty, the two closely held corporations to which the Gravens transferred most of their property, and the Bobby N. Graven Irrevocable Trust, the family trust to which the corporations' stock was transferred. Millie Ann Graven died on September 28, 1989, and the Gravens' son, Bobby F. Graven, was substituted in her place as personal representative of her estate.

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However, by Memorandum Opinion, this Court entered judgment on November 2, 1992 in favor of the trustee, and declared the transfers to be fraudulent and void, ordered all of Bobby N. Graven's property, including his stock in Graven Auction and Graven Realty, be turned over to the bankruptcy estate; found Graven Auction and Graven Realty to be the alter ego of Bobby N. Graven; ordered Graven Auction and Graven Realty to turn over all assets and books to the bankruptcy estate; ordered Bobby Graven to account for all assets; and denied the Gravens' discharge.

Following a hearing on the damages to the estate caused by the Gravens' fraud, on February 8, 1993, this Court entered another Memorandum Opinion in which it ordered the Gravens to turn over specified real property and awarded the trustee actual damages in the amount of $122,086.45 and punitive damages in the amount of $50,000.

For the second time, the district court and the Eighth Circuit Court of Appeals affirmed this Court's judgments, finding that Graven I was the law of the case and that the evidence supported the finding that the Gravens made the transfers with the "intent to hinder, delay or defraud" their creditors. Fink v. Graven Auction Co. (In re Estate of Graven), 64 F.3d 453 (8th Cir. 1995) (Graven II). The Gravens' [sic] Petition for Writ of Certiorari was denied by the Supreme Court of the United States in Graven Auction Co. v. Fink, 1996 WL 122445 (May 13, 1996). Thus, as it stands, the Gravens are under order to return the fraudulently transferred property to the bankruptcy trustee so that liquidation and distribution to creditors can be accomplished.

Presently, this Court is again called upon by the Gravens to deal with the issue of the fraudulent transfers. The

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Court is presented with three matters: (1) a First Amended Complaint for Independent Action for Relief from Involuntary Chapter 7 Bankruptcy Proceedings, Judgments and Orders (hereinafter "First Amended Complaint"), filed by the Gravens, in which they again allege their bankruptcy petition was improperly converted from Chapter 12 to Chapter 7, despite the holdings of the Eighth Circuit in Graven I, and Graven II; (2) a Renewal of Motion to Disqualify, filed by the Gravens; and (3) a Motion for Sanctions, filed by the trustee.

FIRST AMENDED COMPLAINT

The Gravens make two arguments in their First Amended Complaint: First, In Count I, they contend all judgments and orders entered in the bankruptcy proceedings since the filing of their application for voluntary dismissal of the Chapter 12 case were void because the court making those orders were without jurisdiction to do so because the case was converted to Chapter 7 in violation of §303(a) and 1208(e). They contend those sections prohibit an involuntary case under Chapter 7 from being brought against a family farmer and prohibit an involuntarily conversion of a Chapter 12 case to a Chapter 7 case.

Second. in Count II, they allege that assuming the Bankruptcy Code allows such an "involuntary conversion," such a conversion is allowed only upon a finding of fraud, and because there was no finding of fraudulent intent at the time this Court converted the case from a Chapter 12 [sic] to Chapter 7 case, the conversion was improper. The Gravens seek a judgment against the trustee relieving them from all prior orders and judgments rendered after the filing of their application for voluntary dismissal in the Chapter 12 case,

dismissing the current Chapter 7 case against them; ordering the trustee to return all of the Gravens' property in his possession to the Gravens; denying all fees for the trustee and his attorney incurred after the application for voluntary dismissal; and awarding the Gravens' attorney fees incurred after their application for voluntary dismissal.

The trustee, through counsel, filed an answer to the Gravens' First Amended Complaint and a Motion to Dismiss the First Amended Complaint incorporating suggestions in support thereof. The trustee's motion to Dismiss the First Amended Complaint is hereby granted because the issues raised by the Gravens in their First Amended Complaint have already been decided by the Eighth Circuit in Graven I and Graven II.

> The law of the case doctrine prevents relitigation of a settled issue in a case and requires that the courts follow decisions made in earlier proceedings to ensure uniformity of decisions, protect the expectation of the parties and promote judicial economy. When a case has been decided by this court on appeal and remanded to the district court, every question which was before this court and disposed of by its decree is finally settled and determined.

Klein v. Arkoma Production Co., 73 F.3d 779, 784 (8th Cir. 1996)(Citation omitted). See also Travelers Indem. Co. v. Gore, 761 F.2d 1549, 1552 (11th Cir. 1985) (a party can not use an independent action as a vehicle for relitigation of issues where he had a fair opportunity to make his claim or defense in the former action). As such, even if this Court were inclined to change the prior rulings, which it is not, this Court does not have power to do so. Nevertheless, because

the Gravens accuse this Court, the district court, and the Eighth Circuit of being "unaware of the existence of and/or fail[ing] to consider" two sections of the Bankruptcy Code, this Court will address the Gravens' argument one more time.

As discussed, supra, the very issues the Gravens raise in their First Amended Complaint, that the Bankruptcy Code prohibits a conversion of a Chapter 12 case to a Chapter 7 case and that there was no finding of fraud, were expressly decided by this court and twice affirmed by the district court and the Eighth Circuit. Graven I and Graven II. clearly and unequivocally held that the conversion of a Chapter 12 case to a Chapter 7 case is permitted by the Bankruptcy Code, and that the conversion of the Gravens' case to Chapter 7 was proper because they had transferred property with the intent to hinder, delay and defraud their creditors.

Despite this, the Gravens contend those decisions were erroneous because all of the previous decisions on this issue in this case, both from this Court and the Eighth Circuit, ignored 303(a) and 1208(e) of the Bankruptcy Code. The Gravens' argument is without merit: those sections were "ignored" because they have no bearing on this case. Section 303, entitled "Involuntary cases," provides:

> (a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, a family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

Section 1208(e) provides:

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> Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be debtor under such chapter.

Focusing on the language as to family farmers contained in section 303(a), the Gravens contend that those two sections, read together, mean that a family farmer may not be a debtor under Chapter 7, so a Chapter 12 case can not be involuntarily converted to a Chapter 7 case.

The Gravens wholly misinterpret the statutes. In the first place, § 303(a) deals with the commencement of an involuntary Chapter 7 or 11 case. Section 303(b) describes how a case is "commenced" and it should be quite obvious to the Gravens that this case does not fall within any of the described situations. It was the *Gravens* who voluntarily commenced a Chapter 12 case which was *converted* to a Chapter 7 case. Contrary to the Gravens' argument, an "involuntary conversion" (in the sense that a case is converted to another chapter against the debtor's wishes) is not the equivalent to the commencement of an involuntary case under § 303. In the latter, the debtor is forced into bankruptcy by other parties. In the former, the debtor *voluntarily* entered into *bankruptcy himself*, and for some reason (such as fraud), the court determines another chapter would be more appropriate for that debtor. In the case at bar, no Chapter 7 case was "involuntarily commenced" by anyone against the Gravens under §303(a) or any other section. Because an involuntary Chapter 7 case was never "commenced" against Gravens, §303(a) has no application to the Gravens' situation.

The Gravens further contend that as family farmers, their case can not be converted to Chapter 7 because family farmers can not be debtors under that chapter. This argument is also without merit. As has been repeatedly held in this case, § 1208(d) specifically permits a Chapter 12 case to be converted to a case under Chapter 7.[3] As Chapter 12 applies exclusively to family farmers, the Gravens' suggested reading of §1208(e) would make §1208(d) (as well as several other sections referring to the conversion of a Chapter 12 case to Chapter 7) utterly meaningless. Moreover, not only is there no provision in the Bankruptcy Code stating that a family farmer can not be debtor under Chapter 7, § 109(b), which defines who may be a debtor under Chapter 7, mandates that *all person are eligible for liquidation under Chapter 7 except railroads, insurance companies and certain banking institutions.*[4] As such, contrary to the Gravens' assertion, the Bankruptcy Code clearly permit family farmers to be debtors under Chapter 7.

The Gravens' second argument, Count II, is that even if a Chapter 12 case can be converted to a Chapter 7 case,

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[3] Section 1208(d) provides:

> On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

(Emphasis added).

[4] See House Report (Reform Act of 1978) comment to § 109(b), and Senate Report (Reform Act of 1987) comment to §109(b).

§1208(d) allows such a conversion only upon a finding of fraud and this Court had not made a finding of fraud at the time of the conversion of the case to Chapter 7. In support of their position, the Gravens point to Graven v. Fink (In re Graven),138 B.R. 587, 590 (Bankr. W.D. Mo. 1992), in which this Court denied the trustee's motion for summary judgment in the adversary proceeding against the two family corporations on the ground that there was a factual issue as to whether the Gravens acted with the intent to hinder, delay or defraud their creditors in making the conveyances to the third parties. Based on this finding (that a factual issue as to the Gravens' intent to hinder, delay or federal creditors existed so as to prevent summary judgment), the Gravens contend this court had not found the existence of fraud at the time the case was converted., Thus, according to the Gravens, "it would be terrible injustice [sic] to forcibly liquidate [the Gravens'] assets in this Chapter 7 proceedings [sic] when the initial conversion was not based on and in the absence of a required factual finding."

Unfortunately, the Gravens have misunderstood this Court's holding in In re Graven, 138 B.R. 587. In that adversary, the trustee had filed a complaint seeking to avoid certain transfers of property as fraudulent conveyances and to deny the discharge under section §727. The trustee had filed a motion for summary judgment as to that complaint, asserting collateral estoppel and relying on the finding of fraud in the conversion case (In re Graven, 101 B.R. 109) to support summary judgment on his claims based on the fraudulent conveyances. In other words, the trustee sought to use this Court's previous finding of fraud to support his motion for summary judgment on his action to recover the property on the basis of fraudulent conveyance.

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This Court held in In re Graven, 138 B.R. 587, that the findings necessary for the two actions were different. In order to direct the case be converted to Chapter 7 (the issue in In re Graven, 101 B.R. 109), this Court was required to find, and did find, that *the Gravens had committed fraud in connection with the case*. 11 U.S.C. §1208(d). In order to direct the property be returned to the estate on the basis of fraudulent conveyance (the issue in In re Graven, 138 B.R. 587), this Court had to find the Gravens had the intent to hinder, delay or defraud creditors. As this Court expressly stated in In re Graven, 138 B.R. 587:

> The fraud element necessary to the judgment in the previous action is simply not the same as the intent to hinder, delay, or defraud creditors which is required in the instant action. This is so even though the evidence presented in the previous case will greatly overlap with that necessary in the instant case. The general proposition that there was fraud in connection with the case does not necessarily imply the more specific intent to hinder, delay, or defraud creditors.

In re Graven, 138 B.R. at 589. Therefore, this Court found when it converted the case to Chapter 7 that the Gravens *had committed fraud in connection with the case,* which was the necessary finding for such a conversion. Although it was not until later that this Court found the Gravens had *intended to hinder, delay or defraud their creditors, that more specific finding was not necessary when the court converted the case to Chapter 7*. As a result, the Court did make the necessary factual finding at the time it converted the case to Chapter 7, and the Gravens' reliance on In re Graven, 138 B.R. 587, to support an allegation that this Court had not made that finding is misplaced. In fact, In re Graven, 138 B.R. 587,

states the opposite of what the Gravens assert it says and directly supports the trustee's position that the required finding was made at the time of the conversion.

Because this Court again finds the Gravens' bankruptcy case was properly converted to a Chapter 7 case, the trustee's Motion to Dismiss the Gravens' First Amended Complaint is GRANTED and the Gravens' First Amended Complaint is DISMISSED[5]

RENEWAL OF MOTION TO DISQUALIFY

The Gravens have filed a Renewal of Motion to Disqualify in which, for the third time, they request this Court to disqualify itself.[6] The Gravens now assert that the addition of Count II to their First Amended Complaint should affect this Court's decision in ruling on the Motion to Disqualify.

As discussed, supra, Court II of the First Amended Complaint allege that this Court's decision in In re Graven, 138 B.R. 587, shows that this Court had not made a finding of fraud when it converted the case to Chapter 7 in In re Graven, 101 B.R. 109. Thus, the Gravens assert that In re Graven, 138 B.R. 587, is inconsistent with In re Graven, 101 B.R. 109, and that:

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[5]This ruling makes the Gravens' motion for partial summary judgment moot.

[6]The Gravens filed a Motion to Disqualify on February 12, 1996, which this Court denied by order dated February 26, 1996. The Gravens then filed a Motion to Reconsider on March 5, 1996, which this Court denied by order dated march 12, 1996, for the same reasons it originally denied the motion.

> it would be most inappropriate for the Honorable Frank Koger to decide the second count of [the Gravens'] independent action because the Honorable Frank Koger's contradiction with respect to the intent element of fraudulent conveyance puts the Honorable right in the middle of the controversy[.] See In re Jafree, 741 F.2d 133, 135 (7th Cir. 1984) (recusal is required when the judge becomes embroiled in the controversy).

The Gravens then contend that the Court may be required to testify as a witness as to its state of mind at the times it authored the two allegedly contradictory opinions and that it would be "most unfair that the Honorable Frank Koger be the judge of his own contradictions."

Once again, as explained both in this Court's order denying Motion to Disqualify and in the discussion of Count II of the First Amended Complaint, supra, this Court's opinion in In re Graven, 138 B.R. 587, does not contradict its opinion in In re Graven, 101 B.R. 109. There is no need for this Court to explain again why they are not contradictory. Those opinions, both of which were affirmed by the Eighth Circuit, speak for themselves. There is no conceivable reason why this Court would ever be required to testify as a witness to explain its state of mind when it authored them.

As a result, the Gravens' Renewal of Motion to Disqualify is DENIED.

MOTION FOR SANCTIONS

Finally, this Court finds the Gravens' First Amended Complaint to be in violation of Fed. R. Bankr. P. 9011(a) in

that it is not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, but rather is interposed for the purpose of causing unnecessary delay and needless increase in the cost of litigation of the case. The Gravens raise the very same issues previously decided against them on multiple prior occasions by the courts, including the Eighth Circuit Court of Appeals, and their new proposal as to the interpretation of the Bankruptcy Code is so stretched, it defied logic. This case, which was contrived as an attempt to defraud creditors, has been in the bankruptcy system since 1987, and the filing of this complaint is clearly an attempt to further prolong the fraud committed against the Gravens' creditors. The Gravens[sic] were warned by the Eighth Circuit in their last appeal when the Honorable Judge Henson stated, "While this appeal closely borders on the frivolous, we exercise our discretion by declining to impose sanctions." Graven II, 64 F.3d at 456. This Court finds the Gravens have now crossed the border into frivolity. They have continued to abuse the bankruptcy system to perpetrate their fraud. Not only have they wasted this Court's time (and thereby taxpayer resources), they have wasted the time of the creditors, the trustee, and the trustee's attorney, and have caused the trustee to incur additional unnecessary expenses to defend this action. Consequently, this Court finds that the Gravens and their attorney who signed the First Amended Complaint and its related documents, Jianbin Wei, be sanctioned pursuant to Fed. R. Bankr. P. 9011(a). The Gravens and Mr. Wei are hereby ORDERED to pay the costs and reasonable attorney fees incurred by the trustee in responding to and defending against this complaint in the amount of $5,358.78, plus the reasonable fees and expenses for the trustee's attorney incurred at the last hearing in Kansas City, Missouri, the

same to be a joint and several obligation of the parties and their counsel both.

CONCLUSION

For the foregoing reasons, the Gravens' First Amended Complaint for Independent Action for Relief from Involuntary Chapter 7 Bankruptcy Proceedings, Judgments and Orders is DISMISSED, the Gravens' Renewal of Motion to Disqualify is denied; and the Gravens and their attorney, Jianbin Wei, are ORDERED to pay sanctions in the amount of $5,358.78 plus the reasonable fees and expenses for the trustee's attorney incurred at the last hearing in Kansas City, Missouri, same to be a joint and several obligation of the parties and their counsel both.

So ORDERED this 5 day of June, 1996.

s/Frank W. Koger
CHIEF BANKRUPTCY JUDGE

Appendix G-Order of the U.S. Court of Appeals for the Eighth Circuit dated and filed August 31, 1999

United States Court of Appeals
for the Eighth Circuit

Appeal No. 98-1261

Bobby Noah Graven, et al.., Appellants	*	
vs.	*	Order Denying
	*	Petition for
	*	Rehearing and
Richard V. Fink, et al.,	*	for Rehearing
Appellees.	*	En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

August 31, 1999

Order Entered at the Direction of the Court..
Michael Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Appendix H- Constitutional Provisions, Statutes, and Court Rules Involved

Amendment V to the United States Constitution:

[N]or shall any person . . . be deprived of life, liberty or property without due process of law . . . .

Fed. R. Civ. P. 11

(b) **Representations to Court**. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ---

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;

. . . .

(c) **Sanctions**. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firm, or parties that have violated subdivision (b) or are responsible for the violation.

(1) **How Initiated**.

(A) **By Motion**. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). . . . If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion, Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) **On Court's Initiative**. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) **Nature of Sanction; Limitations**. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into the court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) **Order**. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

Fed. R. Bankr. P. 9011(a)

[The wording of Rule 9011 is substantially the same as Fed. R. Civ. P. 11 and is omitted here because Rule 11 has been set forth above.]

Fed. R. Civ. P. 60(b)

Mistakes; Inadvertence; Executable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (6) any other reason justifying relief from the obligation of the judgment . . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . . .

Appendix I- Debtors' First Amended Complaint for Independent Action filed March 14, 1996

In the United States Bankruptcy Court
Western District of Missouri
Southern Division

BOBBY NOAH GRAVEN, and	)	
BOBBY F. GRAVEN as personal	)	Case No.
Representative for the	)	87-04885-FWK
ESTATE OF MILLIE ANN	)	
GRAVEN, Deceased,	)	
Plaintiffs, Involuntary Family	)	Adv. 95-06077-S
Farmers Debtors,	)	
vs.	)	
RICHARD V. FINK, Trustee,	)	
Defendant.	)	

FIRST AMENDED COMPLAINT FOR INDEPENDENT ACTION FOR RELIEF FROM INVOLUNTARY CHAPTER 7 LIQUIDATION PROCEEDINGS, JUDGMENTS AND ORDERS

COME NOW Plaintiffs, Bobby Noah Graven, and Bobby F. Graven as personal representative for the estate of Millie Ann Graven, deceased, by and through their attorney, Jianbin (Jim) Wei, and for their independent action for relief from the bankruptcy proceedings, judgments, and orders, state to the Court the following:

GENERAL ALLEGATIONS

1. Plaintiff Bobby Noah Graven, an individual, and the estate of Millie Ann Graven, deceased, of which Plaintiff Bobby F. Graven is the personal representative, are

involuntary debtors in the bankruptcy proceedings pending in this Court, case numbers 87-04885 and Adv. 89--06057-S;

2. That Defendant Richard V. Fink is the bankruptcy trustee appointed by this Court for the Estate of Plaintiff Bobby Noah Graven and the Estate of Millie Ann Graven, deceased; and service of process can be made on Defendant's attorney Thomas J. O'Neal at 901 St. Louis Street, Suite 1200, Springfield, Missouri, 65086;

3. That Rule 9024 of the Bankruptcy Rules provides that Rule 60 of the Federal Rules of Civil Procedure applies in cases under the Bankruptcy Code;

4. That Rule 60(b) of the Fed. R. Civ. P. provides that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding" and by said rule, an independent action for relief from a judgment, order and proceedings is preserved, see comment following Rule 60 of Fed. R. Civ. P.;

5. That this Court has jurisdiction over the instant case by reason of section 157 of Title 28 of the United States Code, see Crosby v. Mills, 413 F.2d 1273 (10th Cir. 1969);

6. That on November 12, 1987, Plaintiffs Bobby N. Graven and Millie Ann Graven, now deceased, filed, as family farmers, their petition for relief under Chapter 12 of Title 11 of the United States Code, case No. 87-04885-S;

7. That on or about January 24, 1989, Plaintiffs filed their Application for Voluntary Dismissal of their Chapter 12 case;

8. That on or about February 10, 1989, Defendant Trustee filed his Motion to Convert Case to a Chapter 7 case;

9. That on May 22, 1989, this Court issued its memorandum opinion granting Defendant Trustee's Motion to Convert Case to a Chapter 7 case notwithstanding Plaintiffs' filing of their Application for Voluntary Dismissal

and strenuous objection to the conversion, see In re Graven, 101 B.R. 109 (Bankr. W.D. Mo. 1989);

10. That the memorandum opinion was subsequently affirmed by the United States District Court for the Western District of Missouri, on March 29, 1990; and by the United States Court of Appeals for the Eighth Circuit on June 25, 1991, See In re Graven, 936 F.2d 378 (8th Cir. 1991);

11. That on June 22, 1989, Defendant Trustee filed its complaint against Plaintiffs and others in its adversary proceeding, said complaint was amended later on September 1, 1989, case number Adv. No. 89-06057-S;

12. That on November 2, 1992, and on subsequent dates, this Court entered its various judgments and orders in the above-mentioned adversary proceedings against Plaintiffs in various counts, among others things, denying Plaintiffs a discharge and awarded Defendant Trustee actual damages in the amount of 122,086.45 and punitive damages in the amount of $50,000.00;

13. That the judgments entered in the adversary proceeding was subsequently affirmed by the United States District Court for the Western District [of Missouri] and the United States Court of Appeals for the Eighth Circuit, see In re Graven, 64 F.3d 453 (8th Cir. 1995).

COUNT I: ILLEGALITY OF CURRENT INVOLUNTARY CHAPTER 7 PROCEEDINGS

14. By reference, Plaintiffs hereby incorporate in full all their allegations set forth [in] paragraph 1 through 13;

15. That all the judgments and ordered entered in the bankruptcy proceedings (case numbers 87-04885 and Adv. No. 89-06057) since the filing of Plaintiffs' Application for Voluntary Dismissal were void or in error because the courts were without jurisdiction in that plaintiffs' Chapter 12 case

was converted to chapter 7 in violation of sections 303(a) and 1208(e) of Title 11 of the United States Code which sections prohibited an involuntary chapter 7 case against family farmers and the involuntary conversion of Plaintiffs' chapter 12 case to chapter 7 case was such a prohibited Chapter 7 case against family farmers, said sections provide respectively:

Section 303(a) of Title 11

> An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, a family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

Section 1208(e) provides:

> Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be debtor under such chapter.

16. That section 1208(e) makes it very clear that notwithstanding any finding fraud under section 1208(d), a court can not convert a chapter 12 case to a case under chapter 7 if the debtor may not be a debtor under such chapter;

17. That by reason of section 303(a), a family farmer may not be a debtor under chapter 7 if he opposes a Chapter 7 case against him;

18. That in rendering and affirming the judgments, this Court and the appellate courts were unaware of the existence of and /or failed to consider sections 303(a) and

1208(e) of Title 11 of the United States Code, such having been demonstrated by the courts' failure to cite or even mention said statutory sections in all the opinions they have rendered thus far in the bankruptcy proceedings while such statutes had a direct bearing on the conversion issue then before the courts;

19. That by reason of section 103 of Title 11 of the United States Code, which provides that "[e]xcept as provided in section 1161 of this title, chapter 1, 3 and 5 of this title apply in a case under chapter 7, 11, 12 or 13 of this title," section 303(a) applies and should have been considered and applied by this Court and the appellate courts in considering whether to grant Plaintiffs' Application for Voluntary Dismissal or Defendant Trustee's Motion to Convert Case;

20. Plaintiffs' Application for Voluntary Dismissal filed January 24, 1989, should have been granted under section 1208(b) of Title 11 of the United States Code;

21. That Defendant's Motion to Convert Case to Chapter 7 on February 10, 1989, should have been overruled rather than having been granted because said motion did violence to the clear meaning of section 303(a) and 1208(e) of Title 11 of the United States Code;

22. That had Plaintiffs' Application for Voluntary Dismissal been granted, Defendant Trustee, or for that matter, any creditor would not have been able to force Plaintiffs into a Chapter 7 case by reason of section 303(a) of Title 11 of the United States Code;

23. That creditors should not have been allowed to have an involuntary chapter case against Debtors which they would not otherwise have been able to do by reason of section 303(a);

24. That the involuntary conversion of Plaintiffs' Chapter 12 case to Chapter 7 notwithstanding Plaintiffs'

Application for Voluntary Dismissal and strenuous objection and the continued prosecution of Chapter 7 proceedings against the will of Plaintiffs are unjust and are in violation of the federal statutes section 303(a) and 1208(e) of Title 11 of the United States Code;

25. That the courts' failure to consider sections 303(a) and 1208(e) of Title 11 of the united States Code while said statute had direct bearing on the issue constituted such unusual and exceptional circumstances warranting equitable relief to Plaintiffs from the Chapter 7 bankruptcy proceedings, judgments and orders;

26. That this is the time to consider implications of the overlooked statutes on the Chapter 7 case against Plaintiffs because liquidation of Plaintiffs' assets has not started and irreparable harm to Plaintiffs, which would be caused by liquidation, could be avoided if this Court, upon careful consideration of the issue anew in light of the overlooked federal statutes, concludes that an error of law has been committed, as so firmly believed by Plaintiffs;

27. That in filing this independent action, Debtors are not merely interested in stalling or delaying the chapter 7 proceedings, but they do firmly believe, based on the federal statutes which this court and the appellate courts have overlooked, that the chapter 7 bankruptcy proceedings have been instituted and maintained against them illegally and in violation of federal statutes, and Plaintiffs do hereby request for a quick resolution of this independent action.

WHEREFORE Plaintiffs pray that the Court enter its judgment against Defendant Trustee

(1) relieving Plaintiffs from all prior judgments rendered in cases 87-04885-S and Adv. No. 89-06057-S after the filing of Plaintiffs' Application for

Voluntary Dismissal and from the current Chapter 7 bankruptcy proceedings by dismissing the Chapter 7 case against Plaintiffs;
(2) ordering Defendant Trustee to return all of Plaintiffs' property now in the possession of Defendant Trustee to Plaintiff;
(3) denying all fees for Defendant Trustee and for his attorney incurred after January 24, 1989 when Plaintiffs' Application for Voluntary Dismissal should have been granted under section 1208(b) of Title 11 of the United States Code, and ordering a refund of the same, if already paid;
(4) awarding Plaintiffs' attorney's fees incurred after January 24, 1989 when Plaintiffs' Application for Voluntary Dismissal should have been granted under section 1208(b) of Title 11 of the United States Code' and
(5) granting such other relief as the Court deems just and proper under the premises including damages Defendant Trustee has caused Plaintiffs by the continued prosecution of the chapter 7 proceedings against Plaintiffs.

COUNT II

28. By reference, Plaintiffs hereby incorporate in full all their allegations set forth [in] paragraph 1 through 13;

29. That on May 22, 1989, this Court entered a judgment granting the trustee's motion to convert Plaintiffs' chapter 12 case to chapter 7 liquidation proceedings over the objection of Plaintiffs and said judgment was entered based on the finding that Plaintiffs committed fraud in that they had transferred various property to third parties with the intent to hinder, delay and defraud their creditors, see In re Graven 101 B.R. 109(Bankr. W.D. Mo. 1989);

30. That on March 20, 1992, after the judgment to convert was affirmed by the Eighth Circuit, this Court entered an order and memorandum opinion, In re Graven, 138 B.R. 587 (Bankr. W.D. Mo. 1992) in the adversary proceeding (89-06077) denying the trustee's motion for summary judgment against Graven Auction Co., Inc. and others, and in said memorandum opinion, this Court stated the reason for denying summary judgment to the trustee as being there was a factual issue or dispute as to whether Plaintiffs acted with the intent to hinder, delay, or defraud their creditors in making the conveyances to the third parties; see In re Graven, 138 B.R. at 590;

31. That it is very clear from In re Graven, 138 B.R. 587, 590 (Bankr. W.D. Mo. 1992), that there was never a finding of fraud or fraudulent conveyance when Plaintiffs' case was converted to chapter 7 liquidation proceedings against their will and the question of whether Plaintiffs acted with the intent to hinder, delay or defraud their creditors remained a factual or disputed issue up to the time of March 20, 1992;

32. That even if 11 U.S.C. 1208(d) allows involuntary conversion to chapter 7 of title 11 against the will of a family farmer, which Plaintiffs expressly dispute, it only allows conversion based on a finding of fraud, and because there was no and could have been no finding of fraudulent intent at that time of conversion in May of 1989, as is evidenced by this Court's opinion of March 20, 1992, the conversion was not warranted or supported by the required factual finding;

33. That Plaintiff did not discover the contradiction between In re Graven, 138 B.R. 587 (Bankr. W.D. Mo. 1989) and In re Graven, 101 B.R. 109(Bankr. W.D. Mo. 1989) until very recently because of the March 20, 1992 opinion was rendered against parties other than Plaintiffs;

34. That it would be terrible injustice to forcibly liquidate Plaintiffs' assets in this chapter 7 proceedings when the initial conversion was not based on and in the absence of a required factual finding;

35. That it was a violation of Plaintiffs' right to jury trial on the issue of fraudulent intent when this Court purported to find fraudulent intent at the time of conversion.

WHEREFORE Plaintiffs pray that the Court enter its judgment against Defendant Trustee

(1) relieving Plaintiffs from all prior judgments rendered in cases 87-04885-S and Adv. No. 89-06057-S after the filing of Plaintiffs' Application for Voluntary Dismissal and from the current Chapter 7 bankruptcy proceedings by dismissing the Chapter 7 case against Plaintiffs;

(2) ordering Defendant Trustee to return all of Plaintiffs' property now in the possession of Defendant Trustee to Plaintiff;

(3) denying all fees for Defendant Trustee and for his attorney incurred after January 24, 1989 when Plaintiffs' Application for Voluntary Dismissal should have been granted under section 1208(b) of Title 11 of the United States Code, and ordering a refund of the same, if ready paid;

(4) awarding Plaintiffs' attorney's fees incurred after January 24, 1989 when Plaintiffs' Application for Voluntary Dismissal should have been granted under section 1208(b) of Title 11 of the United States Code' and

(5) granting such other relief as the Court deems just and proper under the premises including damages Defendant Trustee has caused Plaintiffs by the continued prosecution of the chapter 7 proceedings against Plaintiffs.

s/Jianbin (Jim) Wei

Appendix J-Deposition Exhibit Graven "173,"
06-11-92 Meh,
Deposition of Bobby F. Graven
taken on June 11, 1992

In the United States Bankruptcy Court
for the Western District of Missouri

In re BOBBY N. GRAVEN and
BOBBY F. GRAVEN, Personal Representative of
the Estate of Millie Ann Graven, Deceased, Debtors

Case No. 87-04885

503 Carlton Property

1-16-85	Note and Deed of Trust owned by Bobby N. Graven debtor Brenda Benton assigned and sold to Graven Auction Co.
8-28-87	Brenda Benton Quit Claim Deed to Graven Auction co. in lieu of lien.
8-29-87	Graven Auction Co. sold to Davenport, taking note and Deed of Trust from Davenport.
Dec-88	House Burned.
4-5-8	Graven Auction Co. repossessed from Davenport.
5-15-89	*Graven Auction Co. contracted with Dunnuck to rebuild at a cost of $7,300.00 paid by Graven Auction. (O'Neals'[sic] law firm represented the Insurance Co. and refused to pay damage) May be a conflict of interest?*
7-10-89	Graven Auction Co. sold to Great Midwest in trade agreement for second mortgage.

Appendix K-Excerpt of Testimony of Mr. Thomas J. O'Neal at the October 21, 1996 Hearing

In re:	)	
BOBBY NOAH GRAVEN and	)	
BOBBY F. GRAVEN, Personal	)	Bankruptcy Case
Representative of the Estate of	)	No. 87-04885
Millie Ann Graven, Deceased,	)	
Debtors.	)	

TRANSCRIPT

CROSS-EXAMINATION

BY MS. ACCONCIA:

Q. Mr. O'Neal, I will ask a few questions. I can't recall whether this came out yet in relation of the facts in response to Mr. Wei's questions. Mr. Crouch was paid a fee, was he not, for his representation of the insurance company?

A. It is - -

Q. Or do you know? I'm sorry.

A. Well, yes, I -- well, the firm was not paid or Mr. Crouch was not paid a fee for anything that was done up to February 3, 1989. I do believe there was a fee paid for the subsequent services.

Appendix L-Fee Affidavit of Mr. Thomas J. O'Neal submitted to the U.S. District Court for determining the Amount of Fed. R. Civ. P. 11 Sanctions

In United States District Court for
the Western District of Missouri
Southern Division

In re: BOBBY NOAH GRAVEN and BOBBY F. GRAVEN, Personal Representative of the Estate of Millie Ann Graven, Deceased, Debtors.	)	Bankruptcy Case No. 87-04885
BOBBY NOAH GRAVEN BOBBY F. GRAVEN, Personal Representative of the Estate of Millie Ann Graven, Deceased, and JIANBIN "JIM" WEI, Appellants, vs. RICHARD V. FINK, Trustee Defendant/Appellee.	)	Adversary No. No. 95-06077 Case No. 96-3388-CV-S-3 Case No. 97-3344-CV-S

AFFIDAVIT OF THOMAS J O'NEAL
CONCERNING FEES AND EXPENSES

COMES NOW Thomas J. O'Neal, and being duly sworn, does states as follows:

1. I am an Attorney at Law licensed and practicing in the state of Missouri since 1968.

Appendix L

2. Attached as Exhibits A, B and C are copies of statements for attorneys' fees and expenses incurred by the Trustee with respect to the bankruptcy of Bobby Noah Graven and Bobby F. Graven, Personal Representative of the Estate of Millie Ann Graven, Bankruptcy Case No. 87-04885.

3. The statement attached as Exhibit A was included as part of the Trustee's Application for Interim Allowance of Fees and Expenses for Attorneys for Trustee, which application was granted by the Bankruptcy Court in an Order filed May 12, 1997.

4. The statements attached as Exhibit B and C have not yet been submitted to the Bankruptcy Court for Approval.

5. The time entries on Exhibits A, B, and C that relate to the above appeals to this Court have been marked with the entries relating to Case No. 96-3388-CV-S-3 being marked "Appeal 1" and the entries relating to Case No. 97-3044-CV-S-3 being marked "Appeal 2".

6. The fees incurred with respect to Case No. 96-3388-CV-S-3 are in approximate amount of:

Thomas J. O'Neal	2.6 hrs. @$140 per hr.=	$364.00
Richard Rollings	52.6 hrs. @$95 per hr. =	$4,997.00
Other personnel	.2 hrs. @$40 per hr. =	$8.00
TOTAL:		$5,369.00

7. The fees incurred with respect to Case No. 97-3044-CV-S-3 are in approximate amount of:

Thomas J. O'Neal 1996	*1.0 hrs. @$140 per hr.=*	*$140.00*
Thomas J. O'Neal 1997	*2.05 hrs. @$140 per hr.=*	*$307.50*
Richard Rollings 1996	*6.2 hrs. @$95 per hr.=*	*$589.00*
Richard Rollings 1997	*36.1 hrs. @$105 per hr.=*	*$3,790.50*
TOTAL:		*$4,827.00*

8. The expenses with respect to Case No. 97-3044-CV-S-3 were in the total amount of $39.00. Due to limits in the software used during 1996, I am unable to

determine the amount of expenses relating to Case No. 96-3388-CV-S-3.

9. The total amount of the fees and expenses requested by the trustee with respect to the above consolidated Appeals is in the amount of $10235.00.

SHUGHART THOMSON & KILROY

By: s/Thomas J. O'Neal

[Notary portion omitted]
[The attached Exhibits A, B and C are omitted].

Appendix M-Excerpts of Petitioner's Brief filed with the Eighth Circuit on the District Court's Rule 11 Sanctions

In the United States Court of Appeals for
the Eighth Circuit

Appeal No. 98-1261

In re	)	
Bobby Noah Graven and	)	
Bobby F. Graven, Personal Rep.	)	
of the Estate of Millie A. Graven,	)	Bankruptcy No.
Deceased, Debtors	)	87-04885-S-7-FWK
BOBBY NOAH GRAVEN,	)	Adv. No. 95-6077
BOBBY F. GRAVEN, Personal	)	
Rep. of Estate of Millie A.	)	
Graven, Deceased, Debtors, and	)	
JIANBIN "JIM" WEI	)	
Movants/Appellants,	)	
vs.	)	Dist. Court Case No.
RICHARD V. FINK, Trustee	)	96-3388-CV-S-3
BUSSELL, O'NEAL & HALL,	)	97-3044-CV-S-3
Appellees,	)	Consolidated
BOB W. CROUCH	)	
Respondent/Appellee.	)	

XI.

Whether the District Court erred in imposing on its own motion Rule 11 sanctions in the consolidated appeal?

By order dated November 7, 1997, the District Court overruled the Trustee's motion to Dismiss and For Sanctions, but decided to impose on its own initiative Rule 11 sanctions. The trustee was ordered to file an affidavit calculating the

fees and expenses suffered as a result of defending against Debtors' appeals in the District Court. The Trustee provided a calculation of the fees and expenses on December 8, 1997, which included of the fees and expenses incurred by the Trustee's attorney in defending against both appeals, Case No. 96-3388 and Case No. 97-3044. By order of January 27, 1998, the District Court awarded the Trustee $10,235.00 in sanctions against the debtors and their counsel jointly and severally.

The standard for appellate review of Rule 11 sanction is whether the trial court abused its discretion. *Carman v. Treat*, 7 F.3d 1379, 1381 (8th Cir. 1993). But the significant impact of Rule 11 sanctions beyond the merits of the individual case, and the concern for the effect on both an attorney's reputation and the vigor and creativity of advocacy by other members of the bar necessarily requires that the appellate court gives less than total deference to the District Court in reviewing the propriety of sanctions. *Pacific Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 118 (7th Cir. 1994).

The substantive standard is whether the sanctioned party's pleading (claim or defense) is grounded in facts and supported by the existing law or at least by a non frivolous argument for the extension, modification or reversal of the existing law or the establishment of new law and whether same was interposed for no good purpose but for delay and for the unnecessary increase of litigation cost. Rule 11 of Fed. R. Civ. P.

In addition, Rule 11 also sets forth procedural requirements a court must comply before imposing Rule 11 sanctions. Whether the lower court complied such procedure

requirements is a matter of law based on the record and this Court's review of the same is *de novo*.

I. The court-initiated sanctions violated Rule 11(c)(3).

Rule 11(c)(3) provides that when imposing sanctions, the court shall (1) describe the conduct determined to constitute a violation of this rule and (2) explain the basis for the sanctions imposed. Rule 11(b) describes four kinds of representation a party makes to the court by presenting a court paper. Furthermore, Rule 11(c)(2)(A) provides that monetary sanctions may not be awarded against a represented party for violation of subdivision (b)(2). Therefore, to satisfy subdivision (c)(3) a court must state which part of subdivision (b) has been violated. It has been held that it is an abuse of discretion when a court grants or denies Rule 11 sanctions without explanation or with explanation that is so conclusory that the appellate court can not review the substance of the decision. *LaSalle National Bank of Chicago v. DuPage County*, 10 F.3d 1333 (7th Cir. 1993). Effective appellate review is impossible unless the district court explains its reasons for imposing sanctions, and therefore, findings of facts are essential to appellate review. *Confederate Memorial Ass'n, inc. v. Hines*, 995 F.2d 295 (D.C. Cir. 1993). It has also been held that in reviewing Rule 11 sanctions, the appellate court looks to the articulated reasons of the district court. *Pacific Dunlop Holdings, Inc. v. Barosh*, 22 F.3d at 118.

Appellant respectfully submits that to fulfill the judicial duty a judge swears to undertake, and to be fair and just to the litigant, a judge must respond to the specific arguments of the litigants. Rule 11(c)(3) required not less but more because the Rule 11 sanctions imposed here not only

deprive the property interest of, but also reflect negatively on the character of, the parties and their counsel. Due process of law requires that a court be responsive to the complaint and arguments of the litigants. Contrary to the requirement of subdivision (c)(3), the District Court failed to describe the conduct by which it believed Debtors and their counsel had violated Rule 11(b), and failed to explain how and why the specific arguments set forth in Debtors and their counsel's appellate briefs violated the spirits of Rule 11(b).

In *Katz v. Household Intern., Inc.*, 36 F.3d 670, 676 (7th Cir. 1994), the Seventh Circuit reversed the district court's sanctions where the lower court failed to discuss the sanctioned party's alternative legal theory. In the instant case, the District Court failed to discuss either count of Debtors' First Amended Complaint for relief from the involuntary bankruptcy proceedings. Neither did the District Court discuss any issue in Debtors' appeal Case No. 97-3044. It should be noted that Case No. 97-3044 was the appeal from the Bankruptcy Court's refusal to remove the Trustee and his attorneys and to deny all fees to the Trustee and his attorney. The record on appeal and the briefs of Appellants in that appeal showed clearly and conclusively actual conflicts of interest and other misconducts committed by the trustee and his attorney. See _____. There was simply no basis, whatsoever, for the District Court to impose any sanctions against Debtors and their counsel for their appeal from the bankruptcy court's refusal to remove the trustee and his attorney and to deny their fees. Even the bankruptcy court did not see fit to impose any sanctions against Debtors and their counsel in the removal proceedings.

Appendix M

Because of the District Court's failure to comply with Rule 11(c)(3), the Rule 11 sanctions must be reversed.

II. The court initiated sanctions violated Rule 11(c)(2)(B)

Rule 11(c)(2)(B) provides that monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are to be sanctions. The Advisory Committee Notes states that the power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. In the instant case, the District Court failed to issue its order to show cause before imposing the sanctions and therefore violated Rule 11(c)(1)(B).

III. The court-initiated sanctions violated Rule 11(c)(2)

The Advisory Committee Notes on Rule 11(c) states that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court. In the instant case, the District Court ordered the debtors and their counsel to pay to the opposing party the fees and expenses incurred in defending against the two appeals. Therefore, the sanctions must be reversed for violation of Rule 11(c)(2).

It should be pointed out that Debtors' appeal No. 97-3044 from the bankruptcy court's judgment of 11/26/97 detailed the actual conflict of interest and many other misconducts of the trustee and his attorney. To allow the

Appendix M

trustee and his attorney fees and expenses incurred in defending their actual conflict of interest and misconducts was clearly abuse of discretion.

s/Jianbin "Jim" Wei

Appendix N-Excerpt of Petition for Rehearing in the Eighth Circuit on the District Court's Rule 11 Sanctions

In the United States Court of Appeals for the Eighth Circuit

Appeal No. 98-1261

In re:	)
BOBBY NOAH GRAVEN and	)
BOBBY F. GRAVEN, Personal	)
Representative of the Estate of	)
Millie Ann Graven, Deceased,	)
Debtors.	)

BOBBY NOAH GRAVEN	)
BOBBY F. GRAVEN,	)
Personal Representative	)
of the Estate of Millie Ann Graven,	) Appeal from the
Deceased,	) United States
Plaintiffs/Movants,	) District Court for
JIANBIN "JIM" WEI,	) the District of
Movant/Appellant,	) Western Missouri
vs.	)
RICHARD V. FINK, Trustee	)
Defendant/Appellee,	)
BOB W. CROUCH,	)
Respondent/Appellee,	)
FARMERLAND[SIC] MUTUAL	)
INSURANCE CO. OF DADE	)
COUNTY,	)
Respondent,	)
THOMAS J. O'NEAL	)
Interested Party.	)

Appendix N

PETITION FOR REHEARING

II. THE PANEL DECISION AFFIRMED THE DISTRICT COURT RULE 11 SANCTIONS IN CASE NUMBER 97-3044 WITHOUT EXPLANATION.

Case number 97-3044 is the appeal Debtors took from the bankruptcy court's denial of Debtors' motions for removal of, and for denial of compensation to, the trustee and his attorney. The bankruptcy court, having heard first-hand the evidence of the misconducts by the trustee's attorney, did not believe that Debtors' motions for removal of the trustee's attorney and for denial of compensation to said attorney were frivolous. Indeed, the bankruptcy court found that there was an actual conflict of interest when the trustee's attorney represented Farmers Mutual in the fire loss matter, and acknowledged that by taking money from the three secured creditors a "potential" conflict of interest was created for the trustee's attorney. (10/21/96 Tr. p. 85, lines 16-17). The district court, however, imposed Rule 11 sanctions on Appellants, awarding fees to the trustee's attorney for defending case number 97-3044,(App. pp. 524-561) without explaining why the trustee's attorney ought be paid by Appellants for defending its own misconducts, and why Appellants should be punished for bringing to the court's attention the misconducts by the trustee and his attorney. In summarily affirming the district's court, the panel decision, too, failed to address that issue.

III. THE PANEL OVERLOOKED THE FACT THAT THE DISTRICT COURT IMPOSED RULE 11 SANCTIONS IN CASE NUMBER 97-3044

Appendix N

WITHOUT ISSUING A SHOW CAUSE ORDER IN VIOLATION OF RULE 11.

The panel overlooked the fact that the trustee never filed a motion for sanctions in case number 97-3044. The trustee's motion for sanctions was filed in case number 96-3388(App. p. 4, docket entry for 11/20/96). But the district court included an award of fees to the trustee's attorney which were incurred in case number 97-3044 without issuing a show cause order. This violated Rule 11(c)(3) which provides that "[m]onetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause . . . ."

The panel also overlooked the fact that the district court ordered Rule 11 sanctions in case number 96-3388 after it denied the trustee's motion for sanctions and therefore overlooked the fact that the sanctions were imposed on the district court's own motion. Again the district failed to issue a show cause order before imposing sanctions in violation of Rule 11(c)(3). The panel also erred in affirming the Rule 11 sanctions because the district court ordered sanctions to be paid to the opposing party when Rule 11 and the Advisory Committee Notes accompanying it clearly limit court-initiated sanctions to a penalty payable into the court.

s/ Jianbin "Jim" Wei

Appendix O-Bankruptcy Court's Memorandum Opinion Ordering Investigation dated and filed March 23, 1988

In the United States Bankruptcy Court for
the Western District of Missouri
Southern Division

In re BOBBY NOAH GRAVEN &
MILLIE ANN GRAVEN, d/b/a Graven Farm
Debtors.

Case No. 87-04885-s-2-11

Memorandum Opinion

Debtors Bobby Noah Graven and Millie Ann Graven, husband and wife, filed their petition under Chapter 12 on November 12, 1987. They thereafter filed their Plan of Reorganization and a hearing on confirmation was set for March 2, 1988. A number of creditors objected to confirmation. Foremost among the objectors was the Federal Land Bank of St. Louis, hereinafter Bank, which also filed a Motion for Continuance of the Chapter 12 confirmation Hearing Pending Completion of Investigation by Chapter 12 Trustee. Section 1202(b) (2) provides that the trustee shall:

> "(2) perform the duties specified [sic] in section 1106(a)(3) and 1106(a)(4) of this title if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders;"

This Court treated the Bank's Motion as not only a motion to continue but as a request by a party in interest for the Court to direct Chapter 12 Trustee to proceed under §1106 (a) (3) and (4) which provide:

Appendix O

"(a) A Trustee shall:

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the cases or to the formulation of a plan;

(4) as soon as practicable-

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;"

Upon that basis the parties presented evidence and the Court issues this opinion.

The evidence indicates that in late 1985 debtors issues a financial statement to the Federal Land Bank and to the local Mercantile Bank that showed assets of over one million dollars in realty and personalty owned. However, the evidence also indicated that in January of 1985 a creditor, Pillsbury Company, obtained a substantial judgment against debtor Bobby N. Graven. In that same month Bobby N. Graven, or both debtors, created two Missouri corporations. They were Graven Realty Company and Graven Auction Company. In January of 1985, Bobby N. Graven only, then

executed and recorded warranty deeds to all the real estate then in the name of either himself or both debtors to said two corporations. Approximately a year later, In January of 1986, Millie Ann Graven executed her individual warranty deeds to the same real estate, once again in favor of the two aforesaid corporations. However, her warranty deeds were not recorded until February 1987. At some time in 1985 or 1986 (the testimony was not clear which) either Bobby N. Graven or Bobby N. Graven and Millie Ann Graven (debtor Bobby N. Graven testified both ways) transferred all of the livestock owned (in excess of 150 head of primarily milk cows), all the farm equipment and machinery owned, and all the family motor vehicles except one to the aforesaid two corporations. Debtor Bobby N. Graven testified he believed there was an executed Bill of Sale but could not find or exhibit same when questioned by the Court.

Meanwhile, leases of the property back to debtors were executed by the corporations through the person of Bobby N. Graven, president of the two corporations. It perhaps goes without saying that the terms of the leases were extremely favorable to debtors. However, since there was no evidence that the corporations gave any consideration for any of the property received, that may also explain why the terms were so favorable.

Contemporaneously, i.e., in January of 186, debtor Bobby N. Graven created an irrevocable trust for his three children, all of whom are emancipated. His oldest son was named Trustee. All of the issued and outstanding stock of the two corporations was transferred to the Trust. There was no evidence of any consideration being paid or received. The Trust has received no money, managed no assets, and done nothing in regard either to the affairs of the two corporations

or to the assets that facially belong to the corporations. He explained that his father took care of all that.

The debtors are represented by able counsel from Atlanta, Georgia, as well as able counsel from Springfield, Missouri. Evidence as to what transpired more than one year prior to the filing of the petition came into the record only over their "statute of limitations" objections. Although a trustee may be bound by the one year time frame set out in §548 of the Bankruptcy Code, some courts have held that he may elect to proceed under §544(6) which here might allow him to invoke Missouri fraudulent conveyance law as well as the applicable Missouri statute of limitations. In re Hollis & Co., ___ B.R. ___ (Bkrtcy. E.D. Ark. 1988). See also Joe T. Dehmer Distributors, Inc. v. Temple, 826 F.2d 1463, 1466, n.6 (5th Cir. 1987); In re Mankin, 823 F.2d 1296, 1299, n.1 (9th Cir. 1987). Of course, should the trustee find evidence supporting a cause of action under Missouri's fraudulent conveyance statute, he would have to prove the elements required by the statute as opposed to merely finding the less stringent elements necessary to prove fraudulent transfer under §548, particularly §548(a)(2).

The Court assumes that it will come to no surprise to anyone who has read this far, that the Court does direct Rick Fink, the Chapter 12 Trustee in the Western District of Missouri, conduct an investigation (as authorized by §1202(b)(2)) under §1106(a)(3) and report to the Court under §1106(a)(4). Should the trustee wish to employ counsel, he may apply to the Court. However, it seems to the Court that this is one instance that counsel who represent creditors should not be employed because of potential conflict of interest.

Appendix O

Further, the Court charges the trustee that while none of the four counsel representing creditors at the time mentioned, either orally or in writing, the Missouri case law pertaining to the purported transfer of entirety owned real estate by separate and individual warranty deeds executed by the two tenants which are contemporaneous in no aspect, the Court wishes the trustee to consider the same. For an excellent starting point on said subject, the Trustee may wish to consider Gill on Missouri Titles. Further, the Court charges the trustee that while none of the four counsel representing creditors at any time mentioned, either orally or in writing, §428.080 Mo. R. S., the court wishes the Trustee to consider the same. In effect, the Court directs an investigation into the facts generally and does not request any conclusions but merely points out two areas of concern that the Court harbors in view of the pleadings and oral statements so far before this Court. A full investigation of the facts herein may indicate neither body of the law has any pertinence and the Court has not researched into either area beyond remembrance of what thirty-five years of practice stores in the Court's mind.

SO ORDERED this 23 day of March, 1988.

s/ Frank W. Koger
BANKRUPTCY JUDGE

Appendix P--Bankruptcy Court's Memorandum Opinion dated and filed on May 23, 1989

In the United States Bankruptcy Court for
the Western District of Missouri
Southern Division

In re BOBBY NOAH GRAVEN &
MILLIE ANN GRAVEN,
Debtors.

Case No. 87-04885-S-2-11

Memorandum Opinion

Debtors filed for relief under Chapter 12 on November 12, 1987. Their plan was duly filed and a confirmation hearing scheduled for March 2, 1988. Also scheduled were objections thereto. On March 2, 1988, a Motion for Investigation by the Chapter Trustee was filed. The Court announced from the Bench at the conclusion of the hearing that it would order an investigation and did so in its Memorandum Opinion of March 23, 1988. The Trustee conducted an extensive and exhaustive investigation, field reports, and a hearing was set on January 24, 1989. At the start of that hearing, debtors filed a Motion For Dismissal and the assembled creditors, as well as the Trustee objected orally, subsequently filing assorted motions to dismiss with sanctions, and/or to convert. Hearing was scheduled thereon on April 10, 1989, parties heard, and the matter is now submitted.

The Court believes that there are two issues:

1. Does the Chapter 12 Trustee's investigation established fraud on the part of the debtors?

2. If so, is a debtor's right to dismiss at any time under 11 U.S.C. §1208(b) subject to the court's ability to convert to Chapter 7 under 11 U.S.C. §1208(d), or must the court dismiss no matter what the circumstances?
Since the second issue can not come into play unless fraud is found, these two items will be discussed in that order.

Fraud

On or about January 16, 1985, debtor Bobby N. Graven incorporated a Missouri corporation, titled Graven Auction Company, Inc. He was the sole incorporator, the president and one of the two directors of the entity. He held all the issued stock. The other director was Joanne Lashua who was also the secretary of the corporation. She was an employee of Bobby N. Graven. She resigned post petition and her whereabouts are unknown. On or about January 16, 1985, Bobby N. Graven conveyed eight tracts of real estate to the corporation. All of the conveyances were by warranty deed executed by Bobby N. Graven. Approximately one year later (January of 1986), debtor Millie A. Graven executed her warranty deeds on the same properties to the corporation.[1] There was no monetary consideration paid by the corporation to either of the debtors. A schedule is attached hereto showing the item of realty, the purported value, the date of each deed, the notary public involved and the date of the deed was recorded.

On January 1, 1996, Bobby N. Graven and Millie Ann Graven executed a bill of sale to Graven Auction Company,

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[1]Mo. R.S. 474.150(2) deems any conveyance of real estate by a married person to be in fraud of marital rights of a surviving spouse.

Inc. covering 169 head of Holstein and Brown Swiss dairy cattle, 5 motor vehicles, 4 tractors, and all equipment that comprised their dairy operation. They subsequently leased all of said property back from Graven Auction Company, Inc. and at all times between January 1, 1996, and March of 1988, when they sought confirmation, were in control and possession of all of said personalty.[2] No consideration was paid for the bill of sale. Debtors have never set a value on said property. Debtors now maintain the lease was terminated in November of 1988 and refuse to answer questions about Graven Auction Company, Inc., or what happened to said personal property.

In addition to these specific items, it appears that debtors were owners of substantial number of promissory notes, deeds of trust, and account receivable which, although not easily traceable, were assigned to Graven Auction Company. Also there is the so called "Manes Farm" which was transferred to the corporation and then back to debtors just prior to bankruptcy.

On January 1, 1986, debtor Bobby N. Graven transferred all of the outstanding shares of the common capital stock of Graven Auction Company to Bobby F. Graven, Trustee for the Bobby N. Graven Irrevocable Trust. The stated consideration was $1.00 and natural love and affection. At the same time 282 shares of the common capital stock of Graven Realty, Inc., another corporation controlled by Bobby N. Graven, was transferred to the same trustee for the same identical consideration, or

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[2]Bringing into play Mo.R.S. 428.080, which would strongly suggest that purported transfer and alleged lease back was void as to the creditors of debtors and that same was still property of the estate.

absence thereof. It would appear that this is all the stock of said corporation except for 18 shares. The stated beneficiaries of the irrevocable trustee are: Bobby F. Graven, Daniell N. Graven and Gayle A. Graven. The beneficiaries of the irrevocable trustee are the children of Bobby N. Graven and Millie Ann Graven. Bobby N. Graven retained the power to vote the stock in the two corporations during his life time.

Bobby F. Graven, the stated trustee, testified that he had received no money, managed no assets, done nothing in regard to the two corporations or as to the assets of the two corporations purportedly owned. He further testified that his father, debtor Bobby N. Graven, took care of all that. This was at the hearing in March of 1988, some two years after the transfers to the trust.

The evidence at the first hearing showed that in January of 1985, Pillsbury Company had obtained a substantial judgment against debtor Bobby N. Graven, and that debtors had substantial debts in 1985.

Moving next to the schedule and statement of affairs filed by debtors, the following items are of interest. Item 4 from Statement of Debtor-In-Possession, Filed Document #8, "There are no leases by Debtor". This is signed by both debtors and is patently false if they were leasing the dairy herd and equipment. Likewise in Item 17 of the Statement of Affairs, debtors list a $70.00 per month rental to Graven Realty, Inc., but do not list the lease of 169 head of dairy cattle, the motor vehicles, the tractors and all the dairy equipment. In the fist operating report filed December 10, 1987, Documents #10, under Cash Received the debtors show $1,675.70 received from 3 cows sold 11/11/87. This was after the alleged transfer and lease back of all the milk

cows, and yet debtors received those funds. Debtors transferred the Oklahoma property (or at least the mineral rights thereto) after filing.

There are other matters, as set out in the reports of investigation of the Chapter 12 Trustee, such as the alleged termination of the lease on the personalty without court approval, the alleged return of all said property to the Trust (or its corporation), the refusal to answer any questions about the corporate affairs, etc., but they merely fill in the background of an already clear pattern of deliberate fraud perpetrated with the intent to hinder, delay and defraud the creditors of the debtors. Further as shown by the report of the Trustee, although the transfers were purported to take place in 1985 and 1986, the recording dates establish that certain of said transfers were not completed until February of 1987, well within one year of the filing of the petition.

Dismissal Versus Conversion

Since the Court has found that debtors did commit fraud, it must consider the second issue framed above, i.e., must the Court dismiss or may it convert? Debtors want to dismiss. Creditors want to convert. 11 U.S.C. §1208(b) and (d) contain the two provisions which are apposite as regrards the divergent desires of the parties. As per Lexis and Westlaw, there are no reported case interpreting which is controlling under Chapter 12, except one recent case from North Carolina. However, there are some interesting parallels found under 11 U.S.C. §1307(b) and (c). Section 1208(b) and 11307(b) are identical except for the inclusion of the reference to 1208 in the latter. Section 1208(d) and §1307(c) are not identical but at least in the pertinent parts are extremely close. In both §1208 and §1307, the debtor's right

of dismissal is mandated by the direction to the court, i.e., the court "shall dismiss" while the right of a party in interest to effect a conversion is couched in the permissive power of the court, i.e., the court "may convert". It is upon this semantic difference that debtors first rely in their contentions. They now seek to fold their tent and silently steal away, perhaps leaving behind all but a few of the larger and more vigilant creditors who may choose to follow the contorted and twisted path of transfers without consideration first to a shell corporation and then to a family trust.

The Court declines to agree with this approach. The first reason is philosophical. Bankruptcy laws have always had their intent the protection and/or rehabilitation of honest debtors. They are not and have not been intended to shield those parties who have attempted to hinder, delay or defraud their creditors. Second, although this Court recognizes and appreciates the grammatical difference between "shall" and "may", other courts have stated:

> Words imparting permission may be read as mandatory and words imparting command may be read as permissive when such construction is made necessary by evident intention or by the rights of the public. Sutherland Statutory Construction, Sards 4th Edition, Volume 3A, pg. 209.

See Jennings v. Suggs, 180 141, 178 S.E. 282 (1935), Ewing v. Union Central Bank, 254 Ky. 23, 72 S.W. 2d 4 (1934). If such an interpretation is permissible, then this is a case where it is appropriate. Debtors listed eleven unsecured creditors, six of whom have claims ranging from $622.00 to $3,645.27. These parties can hardly afford to pursue their rights in any forum other than the bankruptcy proceedings. In bankruptcy

the Trustee can pursue the assets of the estate for the benefit of all the creditors- large and small- secured and priority-alike.

Third, at least one other bankruptcy court has recognized that the apparent mandate of 11 U.S.C. 11208(b) may be tampered at least by delay. In the very recent case of In re Tyndall, 97 B.R. 266 (Bkrtcy. E.D. N.C. 1989), Bankruptcy Judge A. Thomas Small refused the dismissal requested by the Chapter 12 debtors until after the Chapter 12 Trustee had liquidated the collateral securing the debt to FmHA. Judge Small reasons that 11 U.S.C. 1307(b) does not mandate any time frame within which it must be ruled by the Court and that the Court may rule upon other motions by other parties while the debtors' motion for dismissal is pending. Judge Small rules that the same interpretation should be applied to §1208(b) and cites 3 Norton Bankruptcy Law and Practice, section 83.09(1987).

This Court agrees with Judge Small and also with Bankruptcy Judge Ray Reynolds Graves in In re Vieweg, 80 B.R. 838. In that case, Judge Graves held that the court could convert a pending Chapter 13 case under §1307(c) to a Chapter 7 case over the objection of a debtor who had filed a motion to dismiss under 11307(b). Judge Graves preferred an analysis of §1307(b) and (c) that afford reasonable meaning to both sections. To quote Judge Graves:

> "To say Congress intended that a debtor could thwart a creditor's opportunity even to present his proofs by filing a motion to dismiss, thus relegating the creditors to pursuit of his remedies in yet

another forum, a state court, defies reason." Vieweg, id., (1.c. 841).

In the same vein, see In re Tatsis, 72 B.R. 908 (Bkrtcy. W.D. N.C. 1987) wherein Bankruptcy Judge Marvin R. Wooten converted a Chapter 13 proceeding to a Chapter 7 even though debtors had filed a motion to dismiss under 11307(b). Of course, in the Tatsis case, the debtors withdrew said motion to dismiss, but the principles discussed in said case are pertinent. Nor has the Court ignored the cases that have held to the contrary, i.e., that a 11307(b) motion by a debtor to dismiss is automatic and overrides other considerations; e.g. In re Looney, 90 B.R. 217 (Bkrtcy. W.D. Va. 1988) and earlier cases cited therein. Contrary to what Chief Bankruptcy Judge Pearson opines in that case, this Court believes that there is a common purpose behind subsections (b) and (c) of §1307. The purpose is to distinguish between the case of the "honest debtor" who for whatever reason chooses to dismiss and is permitted to do so and the debtor who has sought to use the bankruptcy court as a subterfuge rather than a refuse. It is only where there has been a showing of severe impropriety on the part of the debtor that §1307(c) should or could be invoked.

Finally, there is a precedent in the Western District of Missouri for holding that fraud vitiates a voluntary dismissal of a Chapter 13 proceeding. In the case of Wesley Medical Center v. Wallace, 57 B.R. 364 (W.D. Mo. 1985), the Honorable Scott O. Wright, Chief Judge, vacated a dismissal granted in a Chapter 13 upon the motion of the debtor where fraud had occurred. This Court believe that if fraud can invalidate an order of dismissal under §1307(b), fraud can allow a court to convert a Chapter 12 to a chapter 7 when the public good requires it.

Appendix P

This Court has never, in its brief three plus years on the bench, heretofore refused any motion to dismiss on the part of a debtor under §1307(b) or §1208(b). This Court has never, in that same brief tenure, seen conduct of the kind exposed in this case on the part of a Chapter 13 or Chapter 12 debtor. The Court has been unable to discover any other reported case construing either the Chapter 13 issue or Chapter 12 issue in the Western District of Missouri. The Court freely admits that the view it adopts follows the minority view. But somewhere there must be a starting point in determining how the law in regard to Chapter 12 will evolve. For whatever value then, in the ultimate decision as to the law in this district, this Court shall opt to afford the honest Chapter 12 debtor the unfettered right to dismiss at any time, but shall not reward a debtor it believes has chosen to abuse the legal process and the bankruptcy process by both prepetition and postpetition misconduct and fraud.

The motion to Convert the proceeding to Chapter 7 is GRANTED. The Motion to Dismiss becomes moot as a result thereof. The United States Trustee is directed to appoint a Trustee.

SO ORDERED this 23rd day of May, 1989.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required under Rule 7052, Rules of Bankruptcy.

s/ Frank W. Koger
Bankruptcy Judge

Appendix P

[List of transfers attached toBankruptcy Court's Opinion dated May 23, 1989 with namesof notary omitted. It is not feasible to fit the original chart form into the booklet format]

House & 7 acres, Seymour, Mo. Estimated value: $125,000.00. Deed by BNG to Graven Auction Co. on 1-16-85; BNG's deed recorded 2-1-85; deed by MAG to Graven Auction Co. on 1-1-86; MAG's deed recorded 2-18-87

House & 2 acres, Seymour, Mo. Estimated value: $49,000.00. Deed by BNG to Graven Auction Co. on 1-16-85; BNG's deed recorded 2-1-85; deed by MAG to Graven Auction Co. 1-1-86; MAG's deed recorded 2-18-87.

House in Mountain Grove, Estimated value: $25,000.00. Deed by BNG to Graven Auction Co. on 1-16-85; BNG's deed recorded 2-4-85; deed by MAG to Graven Auction Co. 1-1-86; MAG's deed recorded 2-18-87.

2 Office in Mountain Grove, Estimated value: $72,000.00. Deed by BNG to Graven Auction Co. on 1-16-85; BNG's deed recorded 2-4-85; deed by MAG to Graven Auction Co. 1-1-86; MAG's deed recorded 2-18-87.

House in Mountain Grove, Estimated value: $35,000.00. Deed by BNG to Graven Auction Co. on 1-16-85; BNG's deed recorded 2-4-85; deed by MAG to Graven Auction Co. 1-1-86; MAG's deed recorded 2-18-87.

251 Acres, Mountain Grove. Estimated value: $50,000.00. Deed by BNG to Graven Auction Co. on 1-16-85; BNG's deed recorded 2-6-85; deed by MAG to Graven Auction Co. 1-1-86; MAG's deed recorded 2-18-87.

111 Acres, Cabool, MO. Estimated value: $60,000.00. Deed by BNG to Graven Auction Co. on 11-15-86; BNG's deed recorded 2-18-87; deed by MAG to Graven Auction Co. on 11-15-86; MAG's deed recorded 2-18-87.

40 Acres Oklahoma. Estimated value: $60,000.00. Deed by BNG to Graven Auction Co. on 11-10-86; BNG's deed recorded 11-10-86; deed by MAG to Graven Auction Co. 11-17-86; MAG's deed recorded 11-20-87.

Appendix Q-- Bankruptcy Court's Memorandum Opinion dated and filed March 20, 1992

In the United States Bankruptcy Court for
the Western District of Missouri
Southern Division

In re BOBBY NOAH GRAVEN &
MILLIE ANN GRAVEN,
Debtors.

Case No. 87-04885-S-2-11

Memorandum Opinion

This case comes before the Court on Trustee's motion for summary judgment on Counts I, II, III and IX of his Second Amended Complaint. Trustee seeks to avoid certain transfers of real and personal property as fraudulent conveyances and seeks to deny Debtors their discharge under § 727.

Trustee's motion is based on this Court's order of May 22, 1989, issued in the Gravens' main case. In re Graven, 101 B.R. 109 (Bankr. W.D. Mo. 1989(. That order denied Gravens' motion to dismiss their Chapter 12 case and ordered the case converted to chapter 7 due to fraud on Debtors' part). Id. at 111. Trustee seeks to use the doctrine of collateral estoppel and the finding of fraud in that action to preclude relitigation of the fraud element in his claims that are based on Missouri's fraudulent conveyance statute, Mo. Rev. Stat. 1 428.020 (1986)[1] as well as §§ 548(a)(1)[2] and 727(a)(2)[3] of the Bankruptcy Code.

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[1]Missouri's fraudulent conveyance statute reads:

Appendix Q

Discussion

The element of collateral estoppel which are recognized by the 8th Circuit were recently stated in Johnson v. Miera (In re Miera), 926 F.2d 741 (8th Cir. 1991), to be:

> (1) the issue sought to be precluded must be the same as that involved in the prior action;
> (2) the issue must have been litigated in the prior action;

428.020. Conveyance to defraud creditors, void.--
Every conveyance . . . of any estate or interest in lands, or in goods and chattels . . . made or contrived with the intent to hinder, delay or defraud creditors . . . shall be . . . clearly and utterly void.
Mo. Rev. Stat. § 428.020 (1986) (emphasis added).

[2] §548(a) reads:
The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily --

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that transfer was made or such obligation was incurred, indebted . . . .

11 U.S.C. § 548(a) (1988) (emphasis added).

[3] §727(a) reads in pertinent part:

(a) The court shall grant the debtor a discharge, unless--

. . . .

(2) the debtor, with intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition.

11 U.S.C. § 727(a) (2) (1988) (emphasis added).

> (3) the issue must have been determined by a valid and final judgment; and
> (4) the determination must have been essential to the prior judgment.

Miera, at 743. In addition, when a litigant seeks to apply collateral estoppel against one who was not a named party in the previous case, there must be privity between the party against whom the estoppel is asserted and the named party who had the issue decided against them [sic] in the previous lawsuit. 1B, James Wm. Moore, Moore's Federal Practice Para. 0.44[3-1] (2d. ed. 1991). At minimum, the identity of interest between the party to the previous suit and the party to be estopped must be such that the party to be estopped had a full and fair opportunity to litigate the issue in the previous litigation.

The specific subsection at issue in the previous case was §1208(d). That subsection reads:

> On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

11 U.S.C. 1 1208(d) (1988) (emphasis not in the original). The finding that was necessary to that case was that Debtor had committed fraud in connection with the case. But the element in common to Mo. Rev. Stat. § 428.020 and §§ 548 and 727 of the Code, and to which Trustee seeks to apply the doctrine of collateral estoppel, is that of intent to hinder, delay or defraud creditors. The fraud element necessary to the

judgment in the previous action is simply not the same as the intent to hinder, delay or defraud creditors which is required in the instant action. This is so even though the evidence presented in the previous case will greatly overlap with that necessary in the instant case. The general proposition that there was fraud in connection with the case does not necessarily imply the more specific intent to hinder, delay, or defraud creditors.

In its previous action, this Court stated that the actions of Debtors constituted a "clear patter of deliberate fraud perpetrated with the intent to hinder, delay and defraud the creditors of the debtors." Graven ,101 B.R. at 111. Even though it appears that the Court specifically found the identical element required under the statutes at issue in this action, such finding was not necessary to the outcome of that case. It would be fundamentally unfair to summon a party into court with notice that the issue to be litigated was whether Defendant had committed fraud in connection with the case and then to use the findings in that proceeding to satisfy the element of intent to hinder, delay, or defraud creditors in the subsequent case. Before the doctrine of collateral estoppel may be applied, Defendant must have had, in the prior case, a fair and full opportunity to litigate the same issue under present consideration. Defendants simply had no such opportunity because the issue litigated previously was a broader issue and did not necessarily include the more narrow issue currently being considered.

Moreover, even if the above stated elements of collateral estoppel were fully met, the Court could not apply the doctrine to Counts I and III in this case. Those counts are fraudulent conveyance actions. Count I is brought under the Missouri fraudulent conveyance law, Mo. Rev. Stat. §

428.020 (1986), and Count III is brought under § 548 of the Code. In both actions, Trustee asks this Court to declare the transfers at issue to be void. The use of collateral estoppel is inappropriate where there is a danger "of the potential adverse impact of the determination on . . . the interests of persons not themselves parties in the initial action." Restatement (Second) of Judgments § 28(5) (1982). Of all the defendants in this action, Debtors were the only ones before the court in the § 1208 action. A finding that the transfers in question are void as to Debtors would necessarily have an adverse effect on the title to the property of the parties to whom the transfers were made. But those entities were not before the Court in the previous litigation, so application of collateral estoppel to Defendants would adversely impact entities who have not had a full and fair opportunity to litigate the issue of the validity of the transfers in question.

The Court may grant Trustee's motion for summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law". . . . The Trustee can not use the doctrine of collateral estoppel [relying on *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989)] to satisfy the element of intent to hinder, delay, or defraud creditors. The element of intent is a *factual issue*, therefore, there exists a *factual dispute* as to that element in Counts I, III, and IX which are based on Mo. Rev. Stat. §428.020 and §§548(a)(1) and 727(a)(2) of the Bankruptcy Code. [Emphasis added]

As to Count II, that count requests turnover of the subject property under §542(a). The effect of §542(a) is to compel those in possession of the estate property to turnover such property to the trustee. [Citation omitted]. This depends

on a finding in Count I that the subject property transfers were void under MO. Rev. Stat. 428.020. Because the Court can not grant Trustee's motion as to Count I, there exists a *factual issue* as to whether the subject property is property of the estate. [Italics added].

CONCLUSION

For the foregoing reasons, *factual dispute* exists as to Counts I, II, III, and IX, therefore, trustee's motion for summary judgment must be DENIED. [Italics added].

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required under Rule 7052, Rules of Bankruptcy.

So ORDERED this 20 day of March, 1992.

s/Frank W. Koger
CHIEF BANKRUPTCY JUDGE

Appendix R-Mr. Thomas J. O'Neal's letter to Debtors' Counsel dated August 14, 1996

Re: Bobby Noah Graven and Bobby F. Graven, Personal Representative of the Estate of Millie Ann Graven
Bankruptcy No. 87-04885-S-7-FWK

Dear Mr. Wei:

This will respond to your letter of August 10, 1996.

On March 23, 1988, Judge Koger entered a Memorandum Opinion which directed Trustee Richard V. Fink to investigate the affairs of debtors Bobby N. Graven and Millie Ann Graven and indicated that the trustee could employ an attorney to assist him in the investigation. The court indicated that it did not think it would be appropriate for the attorneys who were representing creditors in the estate to represent the trustee. Thereafter, Mr. Fink applied to the Court for authority to employ this firm to represent him in the investigation. On May 3, 1988, the Court entered its order authorizing the employment of this firm and further ordered that this firm's fees would be guaranteed by Mercantile Wright County Bank, the Federal Land Bank of St. Louis and Boatmen's Mountain Grove National Bank. After the case was converted to one under Chapter 7, the Court entered its order on June 6, 1989, authorizing the employment of this firm as attorneys for Mr. Fink and further ordered that the fees would be guaranteed by Mercantile Wright County Bank, the Federal Land Bank of St. Louis and Boatmen's Mountain Grove National Bank

I am aware that you have reviewed the Court's files. Further, attorneys for the Gravens would have received copies of these orders. I therefore presume that you have reviewed both of these orders prior to your letter of August 10, 1996.

Appendix R

Nonetheless, I am enclosing copies of the Court's Orders of May 3, 1988, and June 6, 1989.

Mercantile Wright County Bank filed an administrative claim for monies it had advanced for attorney's fees. On October 11, 1994, a hearing was held in the U.S. Bankruptcy Court after notice to all interested parties, including the Gravens. After a full hearing wherein itemized statements for attorney's fees and expenses were reviewed by the Court, the Court entered its order allowing super administrative priority claims in favor of Mercantile Wright County Bank, the Federal Land Bank of St. Louis and Boatmen's Mountain Grove National Bank. Enclosed you will find a copy of this order of the Court, although I presume that you also have a copy of this order available to you.

This firm did incur additional fees and expenses which have been paid by the three creditors and which were not included in the Court's order of October 31, 1994. Statements which have been billed and paid by the creditors total $18,333.69. There is presently an outstanding bill for the period up to April 28, 1995, in the amount of $4,462.17 which has not been satisfied. All payments received by this firm for services rendered in this matter have been pursuant to the order of the U.S. Bankruptcy Court and with full authorization by the U.S. Bankruptcy Court.

Trustee Richard Fink has received no payments from anyone.

I believe trustee Fink, this firm and myself deserve an apology.

Very truly yours,

s/Thomas J. O'Neal

Appendix S- Trustee's Application for Employment of Counsel dated and filed May 3, 1988

In re:	)	
BOBBY NOAH GRAVEN and	)	
MILLIE ANN GRAVEN,	)	Bankruptcy Case
	)	No. 87-04885
Debtors.	)	

APPLICATION

The Court has ordered that the undersigned conduct an investigation of the debtors pursuant to 11 U.S.C. Sec. 1202(b)(2).

The undersigned moves that the Court authorize him to retain the services of Mr. Thomas J. O'Neal, Esquire, pursuant to 11 U.S.C. Sec. 327. Mr. O'Neal's services will be billed at $85.00 per hour.

Three general unsecured creditors have agreed to guarantee the payment of Mr. O'Neal's fees in the event there are not any funds in the estate to pay them. These creditors are Mercantile Wright County Bank, The Federal Land Bank of St. Louis, and Boatmen's Mountain Grove National Bank.

Respectfully submitted,

s/Richard V. Fink

Appendix T-Bankruptcy Court Order Authorizing Employment of Counsel dated and filed May 3, 1988

In re:	)	
BOBBY NOAH GRAVEN and	)	
MILLIE ANN GRAVEN,	)	Bankruptcy Case
	)	No. 87-04885
Debtors.	)	

ORDER

On the application of the Chapter 12 trustee and for good cause shown, it is hereby

ORDERED that he is authorized pursuant to 11 U.S.C. Sec. 327 to employ the services of Thomas J. O'Neal, Esq. at the rate of $85.00 per hour. It is further

ORDERED that the payment of Mr. O'Neal's fee is guaranteed by Mercantile Wright County Bank, The Federal Land Bank of St. Louis, and Boatmen's Mountain Grove National Bank.

Date May 3, 1988

s/Frank W. Koger
Bankruptcy Judge